Supreme Court, U.S.
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No. 09-____

IN THE
SUPREME COURT OF THE UNITED STATES

VIETNAM VETERANS OF AMERICA AND
VETERANS OF MODERN WARFARE,
Petitioners,

v.

ERIC K. SHINSEKI, IN HIS OFFICIAL CAPACITY
AS SECRETARY OF THE DEPARTMENT OF
VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the District of
Columbia

PETITION FOR A WRIT OF CERTIORARI

Robert E. Cattanach
Counsel of Record
cattanach.robert@dorsey.com
Dorsey & Whitney LLP
50 S. Sixth Street, Suite 1500
Minneapolis, MN 55402
(612) 340-2600
Counsel for Petitioners

June 17, 2010

QUESTIONS PRESENTED

I. Whether the D.C. Circuit erred when it held that Petitioner associations lack standing to bring claims for unreasonable delay in the adjudication of veterans' disability benefits under the Due Process Clause of the Fifth Amendment to the U.S. Constitution and the Administrative Procedure Act.

II. Whether the D.C. Circuit erred when it asserted that Article III courts lack jurisdiction over Petitioners' constitutional Due Process claims, effectively denying Petitions any judicial forum in which to have their constitutional claims heard, in direct contravention of this Court's opinion in *Johnson v. Robison*, 415 U.S. 361 (1974) and related cases.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceedings below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Vietnam Veterans of America is a not-for-profit corporation that is tax-exempt under Section 501(c)(19) of the Internal Revenue Code. It advocates on behalf of and provides support for veterans of the Vietnam War, including advocacy and support regarding veterans' benefits.

Veterans of Modern Warfare is a not-for-profit corporation that is tax exempt under Section 501(c)(19) of the Internal Revenue Code. It advocates on behalf of and provides support for military veterans who served from 1990 to the present, including advocacy and support regarding veterans' benefits.

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PETITION FOR A WRIT OF CERTIORARI

The Vietnam Veterans for America and Veterans of Modern Warfare respectfully petition that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of matter.

OPINIONS BELOW

court's opinion is unpublished and reproduced at Pet. App. 18. The D.C. Circuit's opinion is reported at 599 F.3d 654, and reproduced at Pet. App. 1.

JURISDICTION

of the D.C. Circuit was entered on This Court has jurisdiction S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The appendix reproduces the Due Process Clause of the Fifth Amendment to the U.S. Constitution and relevant statutes.

STATEMENT OF THE CASE

This case challenges the VA's unreasonable delays in the adjudication of claims for veterans

disability benefits. The Fifth Amendment to the United States Constitution, and the Administrative Procedures Act, both entitle veterans to receive a decision on their claims for disability benefits within a reasonable time. Yet our nation's disabled veterans are forced to wait up to a year or more for an initial decision on their claims. And, if a veteran appeals that *initial* decision, there is a four-and-a-half year delay, on average, to decide the appeal. The VA has not identified any systemic reason for these delays, which have caused, and will continue to cause, unconscionable harm to our nation's disabled veterans. Even more troubling, the Article I court established by Congress and the District Court below both deny any ability to hear Petitioners' or veterans' constitutional claims, thereby exacerbating harm caused to our [illegible]. The VA's arbitrary refusal to act, combined with court of law's refusal to hear the claims, presents important constitutional question [illegible] Court's review.

FACTUAL BACKGROUND

To apply for veterans' disability benefits, an individual veteran must first file an application with one of 57 regional offices ("RO") nationwide. U.S. Gov't Accountability Office, Testimony before the Subcomm. on Disability Asssit. and Memorial Affairs, Comm. on Veterans's Affairs, House of Rep., GAO-07-562T *Veterans' Disability Benefits: Processing of Claims Continues to Present Challenges* at 2 (Mar. 13, 2007). If the veteran disagrees with the regional office's adjudication of

the application, he or she may appeal to the Board of Veterans Appeals ("Board"). 38 U.S.C. § 7201. The Board has the authority to issue final decisions on behalf of the Secretary or remand the case to the Regional Office for further investigation. *Id.* at. § 7104(a). The Secretary must ensure that the Board is staffed with sufficient personal in order to adjudicate appeals "in a timely manner." *Id.* at § 7101(a). Appeals from the Board are heard by the United States Court of Appeals for Veterans Claims ("CAVC"). *Id.* at § 7252. A veteran seeking further review of his or her claim may appeal from a decision of the CAVC to the Court of Appeals for the Federal Circuit and, finally, to this Court. *Id.* at § 7292.

Vietnam Veterans of America ("VVA") and Veterans of Modern Warfare ("VMW") are non-profit organizations that promote the economic, physical, and social wellbeing of America's veterans. Pet. App. 51, 58. Together, Petitioner organizations serve at least 60,000 veterans nationwide. Many of Petitioners' members suffer from severe service-related injuries. Pet. App. 59-60. VVA and VMW help their veterans apply for veterans' disability benefits and appeal adverse benefits decisions. Pet. App. 51, 58. Petitioners have witnessed first-hand the debilitating effects on veterans when the VA delays disability benefits decisions by months and years. Pet. App. 59-60.

The VA, through the Veterans Benefits Administration ("VBA"), administers disability benefits to approximately 3.5 million veterans. GAO Rep. No. GAO-07-562T *Veterans' Disability Benefits: Processing of Claims Continues to Present Challenges* at 1. The VBA is required by statute to

provide disability benefits to qualified veterans pursuant to 38 U.S.C. § 1110. The Administrative Procedures Act requires that this must be made within a reasonable period of time. *See* 5 U.S.C. § 706. Further, the VBA must provide for the expeditious treatment of a remand following a veteran's appeal of a disability benefits decision. 38 U.S.C. §§ 5109B, 7112.

This action challenges the unreasonable delays occurring in the adjudication of claims by the VBA at its regional offices and in the appeals process following an initial benefits decision. Petitioners do not challenge any particular decision made by the Secretary nor do they seek any specific decision in any particular case. Petitioners assert only that their members are entitled to receive a decision – *any* decision – within a reasonable time in accordance with the requirements of the Due Process Clause and the Administrative Procedure Act.

A. Veterans Are Coping with Debilitating Injuries and Many Rely on Disability Benefits To Meet Their Basic Needs

While it is a testament to modern medical technology that many soldiers survive serious combat injuries, success in treating battlefield injuries means more veterans are returning home with severe and multifaceted disabilities. Approximately 20% of veterans injured in Iraq have suffered traumatic brain injury or spinal cord injuries. Linda Bilmes, *Soldiers Returning from Iraq and Afganistan: The Long-term Costs of Providing Veterans Medical Care and Disability Benefits* at 11 (John F. Kennedy Sch. of Gov't, Harvard Univ., Faculty Research Working Paper No. RWP07-001,

2007). An additional 20% live with an amputation, blindness, deafness, or a severe burn injury. *Id.* An unprecedented number of veterans – 36% – have been diagnosed with mental illness, including Post Traumatic Stress Disorder ("PTSD"). *Id.*

Disabled veterans of all American wars rely on their disability benefits to afford basic daily needs like adequate housing, food, and clothing. *Id.; see also* Pet. App. 53, 59. Veterans waiting for the VA to issue a decision have lost their homes to foreclosure, been forced to declare bankruptcy, suffered through divorce, and had to endure declining mental and physical health due at least in part to the VA's delays. Pet. App. 59.

B. Unreasonable And Worsening Delays Plague The Disability Claims System At Every Phase

A veteran's winding journey through the VBA's disability claims process begins by submitting an application for disability benefits to one of 57 regional offices. GAO Rep. No. GAO-07-562T *Veterans' Disability Benefits: Processing of Claims Continues to Present Challenges* at 1. A veterans service representative is assigned to obtain any additional relevant evidence needed to evaluate the claim. U.S. Gov't Accountability Office, Rep. to Congressional Requesters, GAO-03-1045 *Veterans' Benefits: Improvements Needed in the Reporting and Use of Data on the Accuracy of Disability Claims Decisions* at 4 (Sept. 2003). Once the claim is considered complete, a ratings specialist determines whether the veteran is eligible for benefits, and if so, assigns a rating in 10 percent increments based on

the degree of disability. *Id.* at 3 The vast majority of these claims – 88% – eventually result in a determination that the veteran is entitled to some disability benefits. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1072 (N.D. Cal. 2008).

1. Delay In Obtaining An Initial Decision From The Regional Office

In fiscal year 2007, the VA received approximately 838,141 claims for veterans' benefits. U.S. Gov't Accountability Office, Testimony before the Subcomm. on Disability Asssit. and Memorial Affairs, Comm. on Veterans's Affairs, House of Rep., GAO-07-562T *Veterans' Disability Benefits: Processing of Claims Continues to Present Challenges* at 5 (Mar. 13, 2007). In that year, the VA reported that it took the agency an average of 182 days – six months – *to issue an initial decision on veterans' claims.* The VA's statistics almost certainly understate the true delays, and the actual average time it takes the VA to make an initial decision is believed to be at least a year if not more. Pet. App. 69. Petitioners' members Keith King and Bobby O'Daniel had been waiting for fourteen months for decisions on their initial claim and appeal, respectively, at the time the Complaint was filed. Pet. App. 49, 46-47.

These experiences are corroborated by a recent report issued by the VA Office of the Inspector General ("VAOIG"). VA Office of the Inspector General, *Audit of VA Regional Office Rating Claims Processing Exceeding 365 Days*, Sept. 23, 2009, http://www4.va.gov/oig/52/reports/2009/VAOIG-08-03156-227.pdf (last visited June 15, 2010). The report concluded that over 11,000 claims had been

pending before the VBA for over a year; the average of these claims had been pending for 448 days. *Id.* at i. VAOIG found that inefficient workload management at the regional offices caused avoidable processing delays averaging 187 days for 90% of the delayed claims. *Id.* VAOIG estimated that "$14.4 million [in benefits payments were] unnecessarily delayed by an average of eight months because of claims processing deficiencies." *Id.*

The Government Accountability Office ("GAO") has issued several reports criticizing the VA's intolerable delays at this initial phase, yet the agency has not taken the steps outlined by the GAO to provide more timely and accurate decisions. GAO Rep. No. GAO-03-1045 *Veterans' Benefits: Improvements Needed in the Reporting and Use of Data on the Accuracy of Disability Claims Decisions* at 1, 9; GAO Rep. No. GAO-07-562T *Veterans' Disability Benefits: Processing of Claims Continues to Present Challenges* at 7-8. The VA's failure to modernize and streamline its process has prompted the GAO to conclude that the VA is "poorly positioned to provide meaningful and timely support for [veterans] with disabilities." GAO Rep. No. GAO-07-562T *Veterans' Disability Benefits: Processing of Claims Continues to Present Challenges* at 8.

2. Veterans Face Egregious Delays In The Appeals Process

After waiting an average of at least six months, and probably a year or more, for an initial decision by the VA, a disturbing proportion of deserving veterans either do not receive the correct disability rating or have their claims denied completely.

Bilmes, *supra* at 7. Veterans wrongfully denied their disability benefits are then forced to navigate a byzantine system of procedural hurdles and endure lengthy delays in order to have their cases re-evaluated. In a traditional appeal to the Board of Veterans Appeals, a veteran must first request a Statement of the Case from the regional office, which is simply a document that explains why the agency made the decision it made. Yet veterans wait an average of 261 days – almost nine months – for the regional office to provide them with a Statement of the Case. Fiscal Year 2007, Rep. of the Chairman of the Bd. of Veterans' Appeal at 16 (Feb. 8, 2008).

Once the veteran receives and files a Statement of the Case, the regional office must certify the appeal to the Board. While certification is a straightforward, ministerial procedure, a veteran waits for an average of 573 days, *over a year-and-a-half*, for the regional office to take this simple step. *Veterans for Common Sense*, 563 F. Supp. at 1073. Once the Board receives the appeal, a veteran waits, on average, an additional eleven months (approximately 336 days) for the Board to issue a decision. *Id.* at 1074. At this point, the average veteran has had to endure a total delay of *4.4 years* in the VA's disability compensation system. *Id.*

To make matters worse, a significant percentage of veterans who take an appeal with the Board are forced to wait even longer for their claims to be resolved. In 40 percent of decisions on appeal, the Board remands the case to the regional office to correct an error or reevaluate an issue. *Id.* at 1075. These veterans must go back to the regional office to start the process over again. The Board determined

in 2008 that 44 percent of cases remanded to the regional office were due to errors made prior to certification of the appeal, meaning that nearly half of the Board's remands could have been avoided had the regional office exercised any kind of reasonable care. *Id.* In addition, the Board reverses the regional office outright in 20 percent of cases. *Id.*

It is not uncommon for veterans to bounce back and forth between the regional office and the Board for years until the veteran simply gives up and accepts a disappointing or inaccurate decision. Donald Overton, the Executive Director of Veterans of Modern Warfare, averred in his declaration that his organization has members who have been waiting for a final decision on appeal for over five years. Pet. App. 53. Richard Weidman, the Executive Director for Policy & Government Affairs at the Vietnam Veterans of America, averred that the VVA has members who have endured the appeals process for more than ten years. Pet. App. 59.

C. The Backlog Of Claims Is Expected To Grow

The wars in Iraq and Afghanistan have strained, and will continue to strain, the VA's outmoded and unworkable disability compensation system well past the point of any reasonable process. Independent experts predict that the number of filed claims will continue to increase dramatically, causing a corresponding increase in backlogs and delays with no hope of any meaningful improvement in the foreseeable future. Bilmes, *supra* at 11.

The VA's own statistics illustrate the hopelessness of the situation. The number of pending initial claims for disability benefits has steadily increased by almost 50 percent from 2003 to 2006, from about 254,000 to 378,000 claims. GAO Rep. No. GAO-07-562T *Veterans' Disability Benefits: Processing of Claims Continues to Present Challenges* at 3-4. As of September 26, 2009, 420,243 ratings claims were pending, with 88,195 of these claims delayed for *over* six months. U.S. Dep't of Veterans Affairs, *2009 Monday Morning Workload Reports*, Sept. 26, 2009, http://www.vba.va.gov/REPORTS/mmwr/index.asp. The delays are not due to any lack of resources. The VA carried over a $1.3 billion surplus in its budget between FY 2007 and FY 2008. Despite more than adequate resources, the VA has proven utterly incapable of fixing the problem.

PROCEEDINGS BELOW

A. The District Court Proceedings

In their Complaint and attached declarations, Veterans asked the District Court to declare that the VA's unreasonable and harmful delays in deciding veterans' claims for disability benefits violate both the Constitutional right to minimal due process as well as the Administrative Procedure Act. Pet. App. 18. Veterans requested equitable injunctive relief compelling the agency to issue an initial decision on veterans' claims within 90 days and a decision on appeal within 180 days. *Id.* If the VA failed to meet those deadlines Veterans ask for further equitable

relief in the form of interim payments equivalent to a 30% disability rating. *Id.* After oral argument, the District Court denied Veterans' motion for a preliminary injunction, and indicated that it would schedule briefing and argument on the VA's motion to dismiss. *Id.*

Without accepting any further briefs or hearing further argument, however, the District Court then granted the VA's motion to dismiss in a cursory, seven-page opinion. Although the District Court nominally held that Veterans lacked standing, it reached that conclusion by evaluating the merits of the Complaint, contrary to well-established precedent. Pet. App. 24-25. In addition, the District Court held that it did not possess the power to grant any relief in this case, especially with regard to the Veterans' Constitutional claim. *Id.*

B. The D.C. Circuit Proceedings

On appeal, the D.C. Circuit agreed with Petitioners that the District Court erred by improperly conflating an evaluation on the merits with its standing analysis, but went on to hold that Veterans nonetheless lacked standing. Pet. App. 7, 15-17. However, the D.C. Circuit, citing this Court's opinion in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), concluded that Veterans' members could not demonstrate justiciable injury, because Veterans cited only average delay at each stage of the claims process. The D.C. Circuit both misapprehended Veterans' argument and ignored the record, which chronicled specific, individual periods of delay suffered by specific members of Veterans. Pet. App. 16-17.

REASONS FOR GRANTING THE PETITION

This Court has held that associations have standing to sue on behalf of their members, when members would otherwise have standing to sue in their own right. *E.g., Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977). This Court has also noted the importance of providing veterans a forum in which to bring constitutional claims, as well as the inherent constitutional problem of denying any citizen access to a court of law where constitutional claims are raised, *e.g., Johnson v. Robison,* 415 U.S. 361, 367 (1974); *Webster v. Doe,* 486 U.S. 592, 603 (1988). Despite this Court's clear pronouncements, the D.C. Circuit made several important errors that cannot be reconciled with this Court's precedents and have the tragic affect of depriving our nation's disabled veterans of any meaningful review of constitutional challenges to the VA's unconscionable delay.

A. Standing Analysis Errors

Although the D.C. Circuit properly ruled on the District Court's standing analysis error, the D.C. Circuit went on to commit its own error in analyzing the standing issue. After a discourse on Section 511 of the VJRA and then the APA, the D.C. Circuit stated that it would not rely on either of those statutes, and in two short paragraphs at the very end of its opinion concluded that veterans lacked standing based on the demonstrably incorrect premise that Veterans were relying exclusively on average delays as a basis for their claims.

The D.C. Circuit improperly ignored the declarations of Petitioners' members demonstrating the specific delays experienced by declarants and the resulting harm due to the VA's failure to render timely benefits decisions. In addition, the D.C. Circuit misapplied this Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), and failed to conduct its standing analysis in accordance with established precedent on associational standing, warranting this Court's review. *E.g. Hunt*, 432 U.S. at 343.

B. Section 511 Analysis

Given that the fundamentally flawed reasoning of the D.C. Circuit's holding requires reversal on that ground, Petitioners submit that it is appropriate for this Court to confirm that neither of the other bases for affirmance suggested by the D.C. Circuit have merit.

The D.C. Circuit's opinion asserted that 38 U.S.C. § 511, if applied to this case, would preclude jurisdiction to hear Veterans' statutory and constitutional claims for unreasonable delay.[1] To avoid the obvious constitutional problem such a holding would create by conflicting with this Court's opinions in *Johnson v. Robison* and *Webster v. Doe* (when plaintiffs are denied any judicial forum to bring constitutional claims), the D.C. Circuit reasoned that the Court of Appeals for Veterans

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[1] The D.C. Circuit conceded that the other basis it considered for affirmance, the APA's reviewability provision contained in 5 U.S.C. § 704, was not jurisdictional and hence inapplicable. Pet. App. 14.

Claims ("CAVC"), an Article I court, had exclusive jurisdiction to hear the individual Due Process claims of Petitioners' members.

This analysis was improper for two reasons warranting review by this Court. First, the CAVC's jurisdiction is limited by statute to the review of decisions rendered by the Board of Veterans' Appeals. 38 U.S.C. § 7252. As a result, Petitioners' members who wish to challenge the Regional Office delay in granting the initial decision cannot bring these claims to the CAVC or, at least according to the D.C. Circuit, any other court. Similarly, Petitioners' members who wish to challenge the excessive delay on appeal prior to a decision of the Board are likewise without any judicial forum to challenge the constitutionality of the VA's inaction.

The CAVC itself, however, professes not to have the power that the D.C. Circuit attempts to grant it. The CAVC has recognized its own significant limitations with respect to addressing constitutional claims and issuing extraordinary writs. *See Dacoron v. Brown*, 4 Vet. App. 115, 119 (1993) (nothing that as an appellate court, constitutional challenges are only raised in the context "of a proper and timely appeal taken from such decision made by the VA Secretary through the BVA," and noting further that the plaintiff must pursue her constitutional claim in a U.S. District Court).

Second, even assuming that the CAVC has jurisdiction to hear the constitutional challenges brought by Petitioners' members, the *actual* plaintiffs in this case are nevertheless completely foreclosed from bringing their constitutional claims as organizational representatives of aggrieved

veterans. This Court has recognized the unique and indispensable benefits of associational standing. *Int'l Union v. Brock*, 477 U.S. 274, 290 (1986) ("The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association ... in a single case to vindicate the interests of all.") (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187 (1951).

The Decision Below Conflicts With This Court's Decisions Regarding Associational Standing, Warranting This Courts Review

A. The D.C. Circuit Erred in its Application of *Lyons* in Concluding That Veterans Did Not Establish Injury-in-Fact

The D.C. Circuit misconstrued this Court's opinion in *City of Los Angeles v. Lyons* to deny Veterans standing. In *Lyons*, an individual plaintiff alleged that he was injured by a police chokehold, and he sought an injunction barring any future use of the maneuver by the Los Angeles Police Department. 461 U.S. 95 at 103. This Court reasoned that Lyons could not demonstrate an injury-in-fact because it was "no more than conjecture" that Lyons would have an encounter in which he was subjected to another chokehold in the immediate future. *Id.* at 1150. There is nothing conjectural about the alleged injury in this case. Veterans' members, as specifically stated in the declarations detailed below, are *still* waiting for years, sometimes for more than ten years, for a final

benefits decision from the VA. The endless delays continue to cause harm to Veterans members with each passing day that the VA fails to act. Moreover, *Lyons* was not an organizational standing case. *Lyons* does not apply to the facts in this case.

The proper standing analysis for organizations was set forth in *Hunt* as follows: an organization has representational standing to sue on behalf of its members when (1) at least one member would have standing to sue in his own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) the participation of individual members is not required in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977).

The second and third elements of the *Hunt* test are not disputed in this case. Regarding the first element, an individual member has standing to sue if: (1) he has suffered an "injury in fact," (2) his injury is "fairly traceable" to the actions of the defendant, and (3) it is likely that the remedy sought would redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To seek an injunctive remedy, a plaintiff's injury must be "concrete and particularized; the threat must be actual and imminent not conjectural or hypothetical." *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009).

In two brief paragraphs at the end of the opinion below, the D.C. Circuit mistakenly focused only on some portions of the allegations in the Veterans' Complaint related to the average length of delay, and completely ignored other portions that expressly addressed individual delays. Pet. App. 15-17. The

D.C. Circuit erroneously held that "the asserted illegal action the VA has committed is described as the *average* length of time it takes at each state of the claims process. But the average processing time does not cause affiants injury; it is only *their* processing time that is relevant." Pet. App. 16. The D.C. Circuit thus failed to acknowledge that several declarations properly attached to the Complaint stated precisely the individual processing times alleged to be unreasonable in this case, easily demonstrating the specific injury suffered by Petitioners' members.

Specifically, Keith King, a member of Vietnam Veterans of America, made two claims for disability benefits related to health problems attributable to Agent Orange. Pet. App. 49. At the time Mr. King filed his declaration, his disability claims were pending for 14 months without any decision. *Id.* Mr. King alleged that the delay has caused him to live without the disability benefits he believes he is owed, or at the very least, has caused uncertainty while he awaits a decision. *Id.* He further alleged that a prompt decision by the VA would remedy these harms. *Id.*

Bobby O'Daniel, a member of Veterans of Modern Warfare, filed an appeal of his benefits decision in October 2007. Pet. App. 46-47. At the time of his declaration, he had waited 14 months for a decision. *Id.* Mr. O'Daniel alleged that his disability prevents him from working and he is "reliant on disability benefits for day-to-day living expenses." *Id.* More specifically, he alleged that he has had difficulty finding adequate housing and has been forced to live in his truck for extended periods of time. *Id.* Mr.

O'Daniel stated that the delay has harmed him by denying him access to the benefits he believes he is owed and by creating uncertainty while he awaits a decision. *Id.* He further alleged that a promptly issued decision would remedy these harms. *Id.*

In addition to the King and O'Daniel allegations, the declarations of VMW and VVA staff members further demonstrate the injuries suffered by individual members. Donald Overton, the Executive Director of Veterans of Modern Warfare, averred in his declaration that members of his organization have been waiting for a final decision of their appeal for over five years. Pet. App. 53. These members are "solely reliant on the award of disability benefits... to provide them and their families with basic necessities like food, shelter and clothing." *Id.* Richard Weidman, of Vietnam Veterans of America, averred that the VVA has members who have endured the appeals process for more than ten years. Pet. App. 59. Mr. Weidman alleged that a favorable decision would redress the alleged injuries, either by providing his members with benefits for day-to-day living expenses or by "removing the cloud of uncertainty" to help his members move on with their lives. *Id.* at 62.

A plaintiff's burden to establish standing is particularly low in the context of a motion to dismiss. *Lujan*, 504 U.S. at 561. Consequently, "general factual allegations of injury resulting from the defendant may suffice" because a court must "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (quoting *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 889 (1990)).

In *Veterans for Common Sense v. Nicholson*, a similar case from the District Court for the Northern District of California currently on appeal in the 9th Circuit, the court considered the standing issue on a motion to dismiss and easily determined that the plaintiff organizations had established standing. 2008 WL 114919, at *2-*3 (N.D. Cal. Jan. 10 , 2009). The plaintiffs alleged that "their organizations are comprised of veterans, including many who have claims pending before the VA or BVA, who receive benefits that have been threatened with reduction by the VA, or who suffer from PTSD." *Id.* at *2. The court concluded that, under the principles of *Lujan*, "such allegations are sufficient, at [the pleading] stage, to satisfy the Court that the Plaintiffs' members would 'otherwise have standing to sue in their own right'." *Id.* at *3[2] In this case, the facts provided by VMA and VVA declarants exceeded the general allegations deemed to be sufficient in *Veterans for Common Sense*. The declarations in this case alleged specific harm to specific members of the VVA and VMA due to the VA's failure to render timely benefits decisions. Petitioners provided sufficient "general factual allegations of injury resulting from defendant's conduct" and further alleged that a favorable result would redress their grievances satisfying the pleading standards of *Hunt* and *Lujan*.

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[2] After a trial on the merits, the same court held that plaintiff organizations had demonstrated standing. Standing was not an issue challenged by the VA on appeal to the Ninth Circuit.

B. At Least One Of Veterans' Members Would Have Standing To Challenge The VA's Delay On His Or Her Own Right

The doctrine of associational standing requires that petitioners' members, "or at least one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort *that would make out a justiciable case had the members themselves brought suit.*" *Hunt*, 432 U.S. at 342 (emphasis added). The VA argued below that because 38 U.S.C. § 511 denies Article III judicial review of individual VA benefits decisions, Petitioners therefore lacked standing because none of its members could bring claims for unreasonable delay in the District Court. The D.C. Circuit ostensibly declined to address the § 511 preemption issue despite discussing the irreconcilable conflict between its decision in *Broudy v. Mather*, 460 F.3d 106 (D.C. Cir. 2006) and the Sixth Circuit's decision in *Beamon v. Brown*, 125 F.3d 965 (6th Cir. 1997). Pet. App. 37-38.

By necessity, however, the D.C. Circuit's holding reaches a decision on that very issue by finding that § 511 makes Article III courts unavailable to individual veterans whose constitutional rights had been violated by virtue of the VA's unconscionable delays.

Section 511, as part of the Veterans Judicial Review Act of 1988, limits judicial review of individual benefits decisions actually made by the Secretary:

> The Secretary [of Veterans Affairs] shall decide all questions of law and fact

> necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus of otherwise.

Before Congress adopted the VJRA, § 511 (which previously existed as § 211) precluded any judicial review of veterans' benefits decisions. *See* 38 U.S.C. § 211(a) ("decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision").

In *Johnson v. Robison*, 415 U.S. at 373, this Court held that, despite § 211's broad jurisdictional prohibition, Congress cannot deny access to Article III courts to seek redress for constitutional violations, and that a district court therefore must have jurisdiction over constitutional challenges. The *Robison* Court reasoned that such constitutional challenges implicate the most fundamental right to judicial review and, due to the absence of clear congressional intent to restrict review of constitutional questions, review of those questions must be permissible in Article III courts. *Id.* at 368-69, 373. "Such challenges obviously do not contravene the purposes of the no-review clause, for

they cannot be expected to burden the courts by their volume, nor do they involve technical considerations of Veterans' Administration policy." *Id.*

Fourteen years after *Robison* was decided, Congress enacted the VJRA, renumbered § 211 as § 511, and amended it to provide limited review of individual benefits decisions in the Board of Veterans Appeals ("BVA"), Court of Appeals for Veterans' Claims ("CAVC"), and then ultimately the Federal Circuit. In doing so, Congress specifically expressed its intent not to disturb *Robison's* principle of concomitant Article III judicial review. H.R. Rep. No. 100-963 at 20-22 (1988), reprinted in 1998 U.S.C.C.A.N. 5782, 5801-04 ("*Robison* was correct in asserting judicial authority to decide whether statutes meet constitutional muster"). Thus, the legislative history of the VJRA indicates that, contrary to the D.C. Circuit's holding, it was not intended to overturn *Robison* or to foreclose all judicial review of claims in Article III courts. In fact, the House Report clarifies that Congress merely sought to restrict judicial forays "into individual decision making." H.R. Rep. No. 100-963 at 22 (emphasis added). Moreover, the House Report contemplates that Article III review would survive passage of the VJRA: "To the extent that the committee bill allows Article III courts to review VA policy," such review will "aid in the achievement of a more fair and accurate system." *Id.* at 26.

The D.C. Circuit departed from Congress's intent, as noted above, and this Court's holding in *Robison* by stating that it is "virtually inevitable that it would be held that the CAVC has *exclusive*

jurisdiction to hear due process claims premised on the same delay [as APA claims]." Pet. App. 13 (emphasis added).

The courts of appeals are split regarding the reach of § 511. In *Broudy v. Mather*, the D.C. Circuit rejected the VA's broad reading of the statute and recognized that § 511 "does not give the VA exclusive jurisdiction to construe laws affecting the provision of veterans benefits or to consider all issues that might somehow touch upon whether someone receives benefits." 460 F.3d at 112. The D.C. Circuit held that veterans who had been exposed to atomic radiation during active duty could bring constitutional claims in an Article III court alleging a denial of meaningful access to the administrative proceedings before the VA. *Id.* at 112. Key to the court's holding was the absence of a decision by the Secretary:

> The district courts have jurisdiction to consider questions arising under laws that affect the provision of benefits as long as the Secretary has not actually decided them in the course of a benefits proceeding.... *Where there has been no such decision, § 511(a) is no bar.*

Id. (emphasis added). In contrast, the Sixth Circuit in *Beamon v. Brown* held that § 511 precludes federal district courts from considering a challenge to VA procedures alleging unreasonable delay in the administration of veterans benefits. 125 F.3d 965, 971.

> "By lodging review of agency action, including 'action of the Secretary unlawfully withheld or unreasonably

> delayed,' (§ 7261(a)(2)) in the CVA, Congress has manifested a clear intent that the CVA exercise sole jurisdiction over review of all benefits determinations, *including actions seeking to compel the VA to make a decision*.

Id. (emphasis added). The Sixth Circuit's decision in *Beamon*, thus cannot be reconciled with *Broudy*, which mandates exactly the opposite result. In this case, Petitioners' claims do not challenge any specific decision made by the Secretary, and seek only to compel the VA to make benefits decisions—whether favorable or unfavorable—within a reasonable time. Thus, Veterans' claims do not require the review of any "question[s] of law [or] fact necessary to a decision by the Secretary" which are reserved for CAVC under § 511.

THE D.C. CIRCUIT'S ASSERTION THAT IT LACKS JURISDICTION UNDER 38 U.S.C. § 511 CONFLICTS WITH *JOHNSON V. ROBINSON* AND PRESENTS A SERIOUS CONSTITUTIONAL QUESTION WARRANTING THIS COURT'S REVIEW

This Court has warned of the "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 496 U.S. at 604 (permitting jurisdiction in the District Court to hear constitutional challenge brought by former CIA employee who alleged he was fired due to his homosexuality); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986) (permitting judicial review of Medicare regulations);

Johnson, 415 U.S. at 366-67 (permitting facial constitutional challenges to veterans' benefits legislation); *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975).

In *Bowen*, Justice Stevens emphasized the vital importance of judicial review in our system of government, quoting Chief Justice Marshall:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

Bowen, 476 U.S. at 670.

The CAVC affords no such right of review to veterans seeking relief from the VA's delays. In the first instance, the CAVC's jurisdiction is limited by statute to review of opinions issued by the Board of Veterans Appeals. In this capacity, it may "affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." 38 U.S.C. § 7252. The CAVC's jurisdiction is limited to review of decisions by the Board, because the CAVC does not have original jurisdiction under § 7252 to hear constitutional challenges. *Id.* In order for the CAVC to entertain a constitutional claim, it would need to be presented "in the context of a proper and timely appeal taken from such a decision made by the VA Secretary through the BVA." *Dacoron*, 4 Vet. App. at 119. Where, as alleged here, the RO's and the BVA have *failed* to make any decision, the CAVC lacks jurisdiction to aid Petitioners' members and entertain constitutional claims. *Id.* *See also Veterans for Common Sense*, 563 F. Supp. 2d 1078-79.

Nor does the All Writs Act, 28 U.S.C. § 1651(a), allow the CAVC to grant a writ of mandamus for Petitioners' members who have yet to receive *any* adjudication of their claims as a result of the VA's delay at the regional office level. *See Dacoron*, 4 Vet. App. at 119; *Veterans for Common Sense*, 563 F. Supp. 2d at 1078-79. At best, the CAVC may exercise supervisory writ authority over the Board of Veteran's Appeals, but has declined to exercise authority over actions upstream in the process from BVA, such as the actions, or more precisely inactions, of Regional Offices at issue here. *See O'Branovic v. Nicholson*, 19 Vet. App. 81, 83 (2005); *Andre v. Principi*, 301 F.3d 1354, 1361 (Fed. Cir. 2005); *Cleary v. Brown*, 8 Vet. App. 305, 308 (1995).[3]

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[3] The decision from the Sixth Circuit in *Beamon v. Brown*, also cited by the D.C. Circuit in this case, is not to the contrary. In *Beamon*, a group of veterans experiencing delays in the adjudication of their disability benefits brought a constitutional claim challenging VA procedures relating to the processing of disability claims. Each individual plaintiff had experienced delays in receiving a *final* VA decision on his benefits application. 125 F.3d 965, 966 (1997). The Sixth Circuit held that the CAVC had jurisdiction to hear the plaintiffs' constitutional challenge to VA procedures in conjunction with their individual claims for delay *by the Board*. The most common delay faced by veterans is the wait of a year or more for an initial decision by the regional office. *See* Pet. App. 33-34 (averring a 14 month delay for an initial decision by the regional office). In these cases of unreasonable delay, no adjudication has issued. There is no opportunity for the veteran to file a Notice of Disagreement or otherwise pursue an appeal with the Board. *See* 38 U.S.C. §§ 7104, 7252. There is no record from which to appeal.

The *Dacoron* court refused to issue a writ of mandamus because it held that the plaintiff was required to pursue her constitutional claims in a U.S. District Court. *Dacoron*, 4 Vet. App. at 119. Yet, the D.C. Circuit determined Petitioners lacked standing citing incorrectly the "unassailable" conclusion that the "CAVC possesses the exact same authority to deal with excessive delay in its statute as the district courts have under the APA." Pet. App. 10-11. It is inconceivable, one dare say intolerable, that Article I courts established by Congress and the Article III courts in the proceedings below refuse to provide our veterans an adequate forum to raise constitutional challenges to the VA's unconscionable delay, each claiming that the other should be responsible. This presents precisely the kind of avoidance of responsibility that this Court struck down in *Robison* and *Webster*.

CONCLUSION

The petition for a writ of certiorari should be granted, and a case on the merits should be heard.

Respectfully submitted,

Robert E. Cattanach
Counsel of Record
Theresa Bevilacqua
Dorsey & Whitney LLP
50 S. Sixth St., Suite 1500
Minneapolis, MN 55402
(612) 340-2600

Creighton R. Magid
Dorsey & Whitney LLP
1801 K Street, N.W., Suite 750
Washington, D.C. 20006
(202) 442-3555

Counsel for Petitioner

June 17, 2010

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United States Court of Appeals,
District of Columbia Circuit.

VIETNAM VETERANS OF AMERICA and Veterans of Modern Warfare, Appellants

v.

Eric K. SHINSEKI, in his Official Capacity as Secretary of the Department of Veterans Affairs, Appellee.

No. 09-5260.

Argued Feb. 12, 2010.

Decided March 19, 2010.

Background: Veterans advocacy groups brought action against Secretary of the Department of Veterans Affairs (VA) seeking declaration that the average time it took the VA to process veterans' claims for service-related disability benefits violated the Administrative Procedure Act (APA) and the Due Process Clause, and also seeking injunction requiring processing of claims and appeals within specified time periods. The United States District Court for the District of Columbia, Reggie B. Walton, J., dismissed. The groups appealed.

Holding: The Court of Appeals, Silberman, Senior Circuit Judge, held that groups lacked standing to bring action.

Affirmed.

Before: GINSBURG and KAVANAUGH, Circuit Judges, and SILBERMAN, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge SILBERMAN.

*656 SILBERMAN, Senior Circuit Judge:

Appellants are two veterans associations appealing the district court's dismissal of their suit alleging that the Department of Veterans Affairs violated the APA and the Constitution (due process clause) because of the average time it takes the VA to process veterans' claims. The district court held that it lacked jurisdiction and we agree, although for somewhat different reasons.

Congress has created a number of programs that provide monetary benefits to America's veterans and their families. One of the largest such programs provides disability benefits to veterans for service-related injury or disease. Approximately 3.4 million veterans currently receive disability benefits from the VA.

Veterans who seek disability benefits must file a claim with the VA at one of its 57 regional offices throughout the country. The VA is required by statute to assist veterans in developing evidence to support their claims.[1] The VA inter alia arranges for and provides medical examinations when necessary, seeks all government records relevant to a claim (such as military service records and treatment

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[1] See 38 U.S.C. § 5103, et seq.

records from VA medical facilities), and makes reasonable efforts to acquire non-federal records identified by the veteran. Once all relevant evidence has been gathered, a VA "rating specialist" evaluates the claim. This process is informal and non-adversarial. See Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 309-10, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985). The rating specialist first determines whether the disability is connected to eligible service, and if so, determines a percent disability rating, a figure that, along with a statutory schedule, determines the amount of assistance to which the veteran is entitled. The VA issues award letters to veterans entitled to compensation and informs veterans whose claims are denied of the reasons for their denial.

Veterans who wish to contest this initial decision may do so. They may (but are not required to) elect to have their claim reviewed by a more senior rating specialist within the regional office where the claim was initially adjudicated and, if still dissatisfied, they may appeal to the Board of Veterans' Appeals. The Board, led by a chairman responsible to the Secretary of the VA, conducts de novo review of presented claims. While the Board only decides appeals after a claimant has been given the opportunity for a hearing, these proceedings are also quite informal. See id. at 310-11. Adverse decisions by the Board can subsequently be appealed exclusively to the United States Court of Appeals for Veterans Claims ("CAVC"), an independent Article I federal court. The CAVC may review all legal issues, including constitutional claims, and, notably, has the

power to "compel action of the Secretary unlawfully withheld or unreasonably delayed." Decisions of the CAVC may be appealed to the United States Court of Appeals for the Federal Circuit which has authority to "decide all relevant questions of law, including interpreting constitutional and statutory provisions."[2] Further review, of course, may be sought in the United States Supreme Court.

Congress has divested other federal courts of authority to review certain decisions relating to benefits. Thus, 38 U.S.C. § 511 provides that, "[t]he Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents*657 or survivors of veterans," but, subject to a few carefully defined exceptions (including the appeals process outlined above), "the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." Congress, moreover, specified that challenges to VA regulations may only be brought in the Federal Circuit.

Over the last several years, various entities including the Government Accountability Office, veterans service organizations, and congressional committees have raised concerns regarding the timeliness with which the VA system processes claims for benefits. In a 2005 report to the Senate

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2 38 U.S.C. § 7261(a); *id.* at § 7292(d)(1).

Committee on Veterans' Affairs, the GAO noted "large numbers of pending claims and lengthy processing times" in the VA's disability program, and subsequent GAO testimony to a House of Representatives subcommittee indicated that the VA's inventory of pending claims and their average time pending had increased "significantly" over the previous 3 years.[3]

Congress has taken some steps to speed up the claim processing. In 2007, for example, Congress provided funding to the VA to hire an additional 3,100 employees, the vast majority of which were hired into the division responsible for processing disability claims. Congress also recently enacted a law requiring that the VA establish a pilot program in 10 of its regional offices under which fully developed disability claims (a subset of claims where no additional evidence need be collected) are adjudicated within 90 days.[4] Congress has not, however, enacted any statutory deadlines that would require the VA to adjudicate all disability claims within a definite time period.

Unsatisfied with these measures, two advocacy groups for veterans, Vietnam Veterans of America and Veterans for Modern Warfare filed a complaint

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[3] U.S. Gen. Accountability Office, GAO-05-749T, Claims Processing Problems Persist and Major Performance Improvements May Be Difficult, 3 (2005); U.S. Gen. Accountability Office, GAO-07-562T, Processing of Claims Continues to Present Challenges 3 (2007).

[4] See Veterans' Benefits Improvement Act of 2008, Pub.L. 110-389, 122 Stat. 4145 (Oct. 10, 2008).

which alleged that the VA was in violation of the Administrative Procedure Act and the Due Process Clause of the Constitution (as well as federal statutes that require the VA to provide "expeditious treatment" to claims that are remanded from the CAVC to the VA, see 38 U.S.C. § 7112, and from the Board back to the VA regional office, see id. at § 5109B) because it generally takes too long for a veteran to get relief. The plaintiffs sought a declaratory judgment as well as an injunction requiring the VA to issue "an initial decision on every veteran's claim for benefits within 90 days" and to "ensure that appeals of claims decisions are resolved within 180 days."

The complaint seeks a ruling that the VA's entire disability benefits processing system is illegal. It does not suggest the time the VA has taken to adjudicate the claim of any single veteran is unreasonably long, but rather alleges that the average time the VA has taken to reach initial decisions at the regional office stage, the average time the Board takes to resolve appeals, and the average time it takes the regional offices to resolve claims remanded by the Board are all unreasonably long. The plaintiffs, moreover, actually disavow any intention of seeking relief in any individual claim by stating, "[t]o the extent any of the facts presented herein apply to individuals rather than to veterans as a whole, they are intended for illustrative *658 purposes only. Nothing in this complaint is intended as, nor should it be construed as, an attempt to obtain review of an individual determination by the VA or its appellate system."

The district court denied the plaintiffs' motion for a preliminary injunction and, in a published order, granted the VA's motion to dismiss on the grounds that plaintiffs lacked standing because they sought to impose on the VA a "uniform timeline for assessing these claims even though the claims are not monolithic." And the court stated that the plaintiffs were not "likely to have the injuries redressed by a favorable decision due to the plaintiffs' failure to state a claim with respect to a violation of the APA or the Due Process Clause." (emphasis added).

Appellants contend that the district court conflated the merits of the case with standing. We agree. Whether or not plaintiffs stated a claim-whether they had a cause of action-goes to the merits of the case and, as we have held, the merits must be assumed when considering standing. City of Waukesha v. EPA, 320 F.3d 228, 235 (D.C.Cir.2003) (per curiam). That is not what is meant by redressability-the element of standing that is virtually always merely the reciprocal of causation. Dynalantic Corp. v. Dep't of Defense, 115 F.3d 1012, 1017 (D.C.Cir.1997). As a separate element, it is implicated only when the court's power to redress an injury caused by an illegal act is independently impaired. Renal Physicians Ass'n v. HHS, 489 F.3d 1267, 1278 (D.C.Cir.2007).

But the government raises other jurisdictional arguments. Perhaps most prominent is its contention that § 511 precludes district court (and our) jurisdiction because appellants are essentially challenging the Secretary's conclusions of "law and

fact necessary to a [benefits] decision." Appellants respond that they are not challenging the Secretary's actual decision in any case, but rather his failure to decide cases in a timely manner. Yet, one might think that inherent in any adjudicatory decisionmaking process is an implicit determination as to when the decision maker will get to the case. And in this situation we are not dealing with a true judicial-like role, but rather institutional decisionmaking by a huge department, implicating resource allocation and management practices in which necessarily the pace of decisionmaking would have had to be addressed. Whether looking at an individual case or a mass of cases, a decision or decisions as to when to issue opinions would appear to be a preliminary decision necessary to a final decision-and although more precisely an administrative determination, it would seem to be covered by the broad cloak "law and fact" phrase of § 511.

The government points to two of our cases in support, Price v. United States, 228 F.3d 420 (D.C.Cir.2000) (per curiam) and Thomas v. Principi, 394 F.3d 970 (D.C.Cir.2005). In Thomas, a veteran claimed the VA had failed to provide him medical benefits to which he was entitled. But the VA had decided he was not entitled to those benefits, so clearly he was seeking to challenge a decision of the Secretary. Id. at 975. In Price, however, another case involving a claim for medical benefits, we noted that "[t]he record does not reflect whether Price pursued a formal reimbursement claim with the VA. Nevertheless, because Price is challenging the VA's

action or inaction with respect to a veterans' benefits matter, the district court lacked subject matter jurisdiction over the complaint." 228 F.3d at 421 (emphasis added). We stated broadly then, and repeated in Thomas, that § 511 barred a suit that challenged whether the VA "acted properly" in making a benefit determination. Id.; 394 F.3d at 975. That formulation*659 would appear to foreclose appellants' recourse to our court.

Appellants, however, point to another case of ours, Broudy v. Mather, 460 F.3d 106 (D.C.Cir.2006), which seems to support their position. In Broudy, we held that § 511 did not bar a suit in our district court by veterans whose claim was that officials at the Department of Defense and the VA had provided faulty information concerning the plaintiffs' alleged exposure to radiation while serving in Japan-the true information was allegedly "covered up"-and, as a result, the plaintiff's benefits had been denied. Id. at 109-10. We distinguished Price and Thomas as cases in which the VA (the Secretary) had actually made decisions that the plaintiff veterans were not entitled to benefits and the plaintiffs were seeking a review of those decisions, whereas in Broudy, the "Secretary" (really the Board) never made a decision on the issues presented by the plaintiffs-whether officials subordinate to the Secretary had covered up relevant data-because that precise issue had not been presented to the Secretary (the Board). We indicated that only questions "explicitly considered" by the Secretary would be barred by § 511, not questions he could be "deemed to have decided" or, presumably, implicitly decided. Id. at 114 (emphasis

added). Appellants urge that neither the Secretary or the Board has explicitly considered whether the delays alleged in this case violate the law and so their claims are not precluded. [5]

Undeniably, as the government suggested, there is tension between Price and Thomas on the one hand and Broudy on the other-particularly in light of our recognition in Price that the record did not even indicate whether the plaintiff had actually brought his reimbursement claim. (Moreover, as an added point in the government's favor, we note that § 511 expressly precludes a mandamus action-the common law writ designed to deal with unreasonable delay.) We need not seek to resolve the tension between our cases, however, because we perceive another jurisdictional ground upon which we may more comfortably rely.

The government contends that a second jurisdictional defect undermines appellant's case-that APA Section 704 precludes the suit because that section authorizes review only if a party lacks an adequate remedy, and as the government contends, any veteran can bring an unreasonable delay action in the CAVC. Both the Sixth and Eighth Circuits have denied veterans claims on just this basis. See, e.g., Beamon v. Brown, 125 F.3d 965, 967-70 (6th Cir.1997); In re Russell, 155 F.3d 1012, 1013 (8th Cir.1998) (per curiam). Indeed, this conclusion-whether or not jurisdictional (the Sixth Circuit

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[5] In reaching this conclusion we relied on the Federal Circuit's opinion in Hanlin v. United States, 214 F.3d 1319 (Fed.Cir.2000).

thought it was)-appears to be unassailable as the CAVC possesses the exact same authority to deal with excessive delay in its statute that district courts have under the APA. Compare 38 U.S.C. § 7261(a)(2) with 5 U.S.C. § 706(1)[6].

*660 To be sure, the question of whether the plaintiffs could have pursued individual due process claims on behalf of their members is somewhat different. Still a claim that a plaintiff has been denied due process because of delayed agency action is essentially no different than an unreasonable delay claim; indeed, if there is any difference at all, it is that an unreasonable delay claim would likely

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[6] In response to questions raised at oral argument, plaintiffs submitted a Rule 28(j) letter in which they contended that the CAVC's authority to compel unreasonably delayed VA action would not be an adequate alternative remedy even for claims brought by individual veterans. Plaintiffs argue that because the CAVC only has jurisdiction of final decisions by the Board of Veterans' Appeals, the CAVC is powerless to order the VA to act when the veteran is still waiting for a decision. But the CAVC has power to issue writs of mandamus compelling VA officials to take action that has been unreasonably delayed even if there has been no final decision by the Board. See, e.g., Erspamer v. Derwinski, 1 Vet.App. 3, 6-9 (Ct.Vet.App.1990). And it can hardly be contended that the CAVC's power to compel delayed action through mandamus is an inadequate alternative to a district court's power to compel delayed agency action under the APA-the standards for obtaining relief are essentially the same. See In re Core Communications Inc., 531 F.3d 849, 855 (D.C.Cir.2008) ("The central question in evaluating a claim of unreasonable delay [under the APA] is whether the agency's delay is so egregious as to warrant mandamus.") (quotation omitted).

be triggered prior to a delay becoming so prolonged that it qualifies as a constitutional deprivation of property. See Schroeder v. City of Chicago, 927 F.2d 957, 960 (7th Cir.1991) (explaining that a due process claim premised on delay occurs when "delay ... ripen[s] into deprivation"). For much the same reasons that courts do not tolerate litigants' artful attempts to avoid the Court of Federal Claims by phrasing complaints as seeking injunctive relief when a money judgment would provide an adequate remedy, see Consolidated Edison v. U.S. Dep't of Energy, 247 F.3d 1378, 1385 (Fed.Cir.2001) (collecting cases), it seems unlikely plaintiffs would be permitted to pursue due process claims in district court that are no different (they may be even more difficult to establish) than unreasonable delay claims that must be brought in the CAVC.

If plaintiffs were able to circumvent the CAVC's jurisdiction by creative pleading, district courts would be forced to issue unnecessary constitutional decisions when a statutory ground for the decision would do. Plaintiffs would be able to seek the same exact relief in multiple fora-bringing the due process claim in the district court and the unreasonable delay claim in the CAVC-despite the general rule proscribing the splitting of a cause of action. See, e.g., Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 117 (D.C.Cir.1982). Absent some indication Congress intended such a strange result, we think it doubtful it should be sanctioned. As we recognized in Environmental Defense Fund v. Reilly, 909 F.2d 1497, 1507 & n. 119 (D.C.Cir.1990), the "rule proscribing the splitting of an indivisible cause of

action" is one of several rules "designed to minimize expense and inconvenience to litigants and conserve the finite resources of the courts," and that "[a]bsent plain statutory language or convincing indication to the contrary" federal courts should not presume Congress wished to uproot such principles. See also Doleman v. Levine, 295 U.S. 221, 226, 55 S.Ct. 741, 79 L.Ed. 1402 (1935) ("But the [statute] does not purport to split the cause of action. A purpose to do violence to the firmly grounded tradition of the unity of a cause of action at law, by casting on the defendant the burden of defending two suits, is hardly to be implied."). Thus assuming an APA claim based on unreasonable delay must be brought in the CAVC, we think it virtually inevitable that it would be held that the CAVC has exclusive jurisdiction to hear due process claims premised on the same delay.[7]

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[7] Nor do we think Webster v. Doe, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988) requires that the district court remain open to the constitutional claim. In that case, a former CIA employee alleged that he was fired because he was a homosexual and that this violated the Administrative Procedure Act and the Constitution. The Supreme Court held that although he could not obtain judicial review under the APA because such decisions were committed to the agency's discretion by law, id. at 600-01, 108 S.Ct. 2047, a court could review constitutional claims based on the same allegation. The court explained that without a clear statement from Congress that it intended to do so, the Court would avoid the "serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Id. at 603, 108 S.Ct. 2047. That constitutional question avoided by the Court in Doe would

*661 Our discussion of this issue is tentative, however, because again we encounter some conflict in our own opinions-this time as to whether the APA's reviewability provision (§ 704) is jurisdictional and, therefore, whether it is properly considered anterior to any merits questions. In a line of our cases stretching from the 1980s to 2005, we repeatedly stated-and held-that the APA's reviewability provisions were jurisdictional.[8] We did so notwithstanding a footnote in a Supreme Court opinion, Air Courier Conference v. Am. Postal Workers Union, 498 U.S. 517, 523 n. 3, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991), observing that the judicial review provisions of the APA are not jurisdictional.[9]

Nevertheless, in 2006, we changed course in Center for Auto Safety v. NHTSA, 452 F.3d 798, 805 (D.C.Cir.2006), followed a month later by Trudeau v.

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not be a factor here-even if review of the due process claim is not available in the district court, the CAVC could still hear it (as well as the essentially identical unreasonable delay claim). See Beamon, 125 F.3d at 969.

[8] See Ticor Title Ins. Co. v. FTC, 814 F.2d 731, 746 (D.C.Cir.1987) (opinion of Williams, J.); Public Citizen v. Office of the U.S. Trade Reps., 970 F.2d 916, 918 (D.C.Cir.1992); DRG Funding Corp. v. Sec'y of HUD, 76 F.3d 1212, 1214 (D.C.Cir.1996); Indep. Petroleum Ass'n v. Babbitt, 235 F.3d 588, 594 (D.C.Cir.2001); Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 13 (D.C.Cir.2005).

[9] The Supreme Court relied on Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977) for this proposition. But Califano held only that the APA generally does not afford an implied grant of subject-matter jurisdiction. Id. at 107, 97 S.Ct. 980.

FTC, 456 F.3d 178 (D.C.Cir.2006).[10] In both cases we relied on a party's argument in a previous case, Reliable Automatic Sprinkler v. Consumer Prod. Safety Comm'n, 324 F.3d 726, 731 (D.C.Cir.2003), in which we actually declined to resolve the issue. And in Trudeau, we referred to our previous line of cases as only "loosely" referring to the APA's review provision as jurisdictional. 456 F.3d at 184. Trudeau also relied upon Arbaugh v. Y & H Corp., 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). While not an APA case, Arbaugh did state that statutes should be treated as nonjurisdictional unless Congress clearly indicates otherwise, thus further undermining our jurisdictional holdings. Id. at 515-16, 126 S.Ct. 1235. We think the proposition that the review provisions of the APA are not jurisdictional is now firmly established. We therefore pass on to another jurisdictional difficulty, a variation of the standing issue upon which the district court rested.

It is settled law that an association has standing to sue only if at least one member would have standing on his or her own right. Young America's Foundation v. Gates, 573 F.3d 797, 799 (D.C.Cir.2009). Appellants produced affidavits of members whose cases were pending-in their view, much too long-to establish injury.[11] Yet appellants, in a rather

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[10] The court does have a method-the Irons footnote-which allows the full court to endorse such a reversal of course without full en banc rehearing. See Irons v. Diamond, 670 F.2d 265, 268 n. 11 (D.C.Cir.1981).

[11] The plaintiffs' affidavits also reference members whose claims have been fully processed and identify negative effects they suffered while they waited for a decision. But

apparent effort to avoid the preclusive bite of both § 511 and *662 § 704, went out of their way to forswear any individual relief for the affiants. Indeed, the asserted illegal action the VA has committed is described as the average length of time it takes at each stage of the claims process. But the average processing time does not cause affiants injury; it is only their processing time that is relevant. If, for example, affiants fell at the quick-processing end of a bell-shaped curve, a high average processing time would be irrelevant to them, and to reverse the analysis, a low average would not avoid injury if affiants were at the other end of the curve. In sum, assuming the alleged illegality-that the average processing time at each stage is too long-that "illegality" does not cause the affiants injury. And causation is a necessary element of standing. Young America's Foundation, 573 F.3d at 799.

If the affiants were suing by themselves-which is how we must analyze the claim-asserting that the average time of processing was too long, it would be apparent that they were presenting a claim not for themselves but for others, indeed, an unidentified group of others. But one can not have standing in federal court by asserting an injury to someone else. See City of Los Angeles v. Lyons, 461 U.S. 95, 108-09, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). It seems

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veterans whose claims have already been processed would no longer have standing to seek the declaratory and injunctive relief plaintiffs seek in this case. City of Los Angeles v. Lyons, 461 U.S. 95, 102-05, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).

the district judge intuited this point by noting the claims were "not monolithic."

For the foregoing reasons, the district court's order granting the motion to dismiss is affirmed.

So ordered.

C.A.D.C.,2010.

Vietnam Veterans of America v. Shinseki

599 F.3d 654

United States District Court,
District of Columbia.

VIETNAM VETERANS OF AMERICA, et al.,
Plaintiffs,

v.

James B. PEAKE, Secretary of the Department of Veterans Affairs, Defendant.

Civil Action No. 08-1934 (RBW).

June 23, 2009.

ORDER

REGGIE B. WALTON, District Judge.

*1 The plaintiffs, two non-profit veterans organizations, bring this action "on their own behalf and as representatives of their members and constituencies," seeking, pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 555(b) (2006), the Due Process Clause of the Fifth Amendment to the United States Constitution, and 38 U.S.C. §§ 5109B, 7112 (2006), declaratory and injunctive relief to compel the defendant, United States Department of Veterans Affairs ("Department"), to render final decisions on all veterans' claims for disability benefits pending before it "expeditious[ly]" and "within a reasonable time," which they propose should be 90 days. Complaint ("Compl.") ¶¶ 1, 13-15, 72-88. The plaintiffs requested a preliminary injunction on November 10, 2008, which the Court denied on

December 17, 2008, after conducting a hearing on the motion during which both parties presented oral arguments. The Court found at the conclusion of that hearing that the plaintiffs had not met the standard required to obtain a preliminary injunction. *See* Dec. 17, 2008 Order.

This matter is now before the Court on the Department's motion to dismiss the plaintiffs' complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), based on the Court's lack of jurisdiction and the plaintiffs' lack of standing.[1] Defendant's Motion to Dismiss ("Def.'s Mot."); Memorandum Supporting Defendant's Motion to Dismiss and Opposition to Plaintiffs' Motion for a Preliminary Injunction ("Def.'s Mem.") at 14-26; Defendant's Reply Memorandum in Support of Defendant's Motion to Dismiss ("Def.'s Reply"). The plaintiffs oppose the motion. Plaintiffs' Combined Reply Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction and Opposition to Defendant's Motion to Dismiss ("Pls.' Opp'n") at 4-16. For the reasons expressed at the December 17, 2008 hearing on the plaintiffs' motion for a preliminary injunction, in addition to the reasons set forth in this order, the Court cannot award the relief that the plaintiffs seek and must dismiss the complaint because the plaintiffs have not established that they possess the requisite standing to pursue this matter.

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[1] The Department filed its motion seeking dismissal of the complaint as part of its opposition to the plaintiffs' motion seeking a preliminary injunction. The Court bifurcated the two motions at the December 17, 2008 hearing.

Article III of the United States Constitution limits the Court's jurisdiction to actual cases and controversies, one element of which is the "essential and unchanging" principle that the plaintiff has to have standing to bring a claim in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Essentially, standing requires that a plaintiff demonstrate: (1) an "injury in fact," which is defined as "an invasion of a legally protected interest [that] is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical [;] (2) "a causal connection between the injury and the conduct complained of [;]" and (3) a likelihood "that the injury will be redressed by a favorable decision." *Id.* at 560-61 (internal citations and quotations omitted); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). "These requirements [of standing] apply whether an organization asserts standing to sue, either on its own behalf, or on behalf of its members." [2] *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C.Cir.1996)

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[2] While the plaintiffs technically bring this action, in part, on behalf "of their members and constituencies," Compl. ¶ 15, the Court is not aware of any legal authority interpreting the term "constituencies" to include any persons or groups beyond the traditional scope of an organization's voluntary or involuntary membership. *See Hunt*, 432 U.S. at 342-45 (referring interchangeably to an organization as both the "representative of its constituents" and the "representative of its members"). And, as the plaintiffs use only the term "members" in their opposition filing, Pls.' Opp'n at 4-6, they do not appear to urge the Court to draw the distinction identified by the Department, *see* Def.'s Mot. at 15 n. 7.

(citing *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378, 102 S.Ct. 1114, 71 L.Ed.2d 214, (1982)). There is a slight difference, however, in that "an organization suing on its own behalf must demonstrate that it has suffered 'concrete and demonstrable injury *to [its] activities[,]*' " *id.*, whereas an organization suing on behalf of its members, must show that the individual members would otherwise have standing to bring the claims on their own behalf. *Hunt v. Wash. Apple Adver. Comm'n,* 432 U.S. 333, 341-43, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); *Arizonans for Official English v. Arizona,* 520 U.S. 43, 65-66, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997).

*2 As to the injury in fact requirement, the plaintiffs' complaint is factually devoid of any specific allegation that the Department's processing of any specific claim for disability benefits before it has caused the organizations or its members any "concrete and particularized" harm, which poses an "actual or imminent" violation of "a legally protected interest." *Lujan,* 504 U.S. at 560. The plaintiffs attempt to remedy this failing by attaching sworn declarations to their motion for a preliminary injunction wherein the adverse impact on the health and general economic condition of veterans caused by the delay in process their claim are chronicled, and the submission of additional declarations with their combined reply memorandum in support of their motion for a preliminary injunction and their opposition to the defendant's motion to dismiss by veterans who have applications pending before the Department. Given the Court's authority to look

beyond the four corners of the complaint to "resolve disputed jurisdictional facts when considering a motion to dismiss," *Tootle v. Sec'y of Navy,* 446 F.3d 167, 174 (D.C.Cir.2006), and standing being constitutionally required for "federal-court jurisdiction," *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, ----, 127 S.Ct. 2553, 2570, 168 L.Ed.2d 424 (2007), the Court can consider these affidavits in assessing whether there is an injury in fact, in light of the fact that the affiants are asserting that they have been personally harmed by the delays. Despite this consideration, the plaintiffs have nevertheless failed to establish that they have standing to pursue this case.

The plaintiffs essentially seek in their complaint to have the Court collectively and prospectively impose upon the Department an arbitrary timeline of 90 days to resolve all claims submitted to it, regardless of the nature, complexity, or status of the claimants' individual disability claims. Indeed, the plaintiffs would have the Court impose on the Department a uniform timeline for assessing these claims even though the claims are not monolithic. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 109, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *see also Allen v. Wright,* 468 U.S. 737, 759-60, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); (finding that "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations[,] ... are rarely if ever appropriate for federal-court adjudication").

Even assuming that the plaintiffs can establish a causal connection between the injuries alleged and

any delay by the Department in processing the claims, the Court cannot find that the plaintiffs are likely to have the injuries redressed by a favorable decision due to the plaintiffs' failure to state a claim with respect to a violation of the APA or the Due Process Clause. Although the Court has authority to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1) (2006); *see* 5 U.S.C. § 551(13) (2006) (defining "agency action" as referring to "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"), "[w]hen, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.' " *Lujan*, 497 U.S. at 882. And, the same is true with respect to other generally imposed legal requirements that the Department resolve benefits claims "expeditious[ly]," as asserted by the plaintiffs. Compl. ¶¶ 4, 47, 80-83 (citing 38 U.S.C. §§ 5109B, 7112 (requiring the Secretary to act as "necessary" and "expeditious[ly]" in resolving any claims remanded to the Department by the Board of Veterans' Appeals or the Court of Appeals for Veterans Claims)). Given that Congress considered, but did not impose mandatory timelines upon the Department except in particular circumstances, *see* Veteran Benefits Improvement Act of 2008, Pub.L. 110-389, 122 Stat. 4145, § 221 (Oct. 10, 2008) (providing for 90-day adjudication of fully developed veteran benefit claims in certain Department offices); *cf.* H.R. 5892, 100th Cong.2d Sess. (2008) (a bill containing a provision that would have required

the Department to adjudicate all "fully developed" claims within 90 days, which passed only in the House), the Court is hard pressed to conclude that the plaintiffs have adequately identified any discrete and final agency action that is currently ripe for legal challenge, *see Lujan,* 497 U.S. at 894 ("Except where Congress explicitly provides for [judicial] correction of the administrative process at a high[ ] level of generality, [the courts] intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." (citation omitted)).

*3 Nor does one's guarantee of Due Process entitle a claimant to have a benefit decision awarded within any "talismanic number of years or months." *Coe v. Thurman,* 922 F.2d 528, 531 (9th Cir.1990); *see U.S. v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency,* 461 U.S. 555, 565, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983) ("Little can be said on when a delay becomes presumptively improper [under a Due Process analysis], for the determination necessarily depends on the facts of the particular case."). The Department represented at the December 17, 2009 hearing that it was making diligent efforts to process benefits claims in a timely manner, as well as comply with the congressional mandate that a limited subset of disability claims must be processed in 90 days. *See* Veteran Benefits Improvement Act of 2008, Pub.L. 110-389, 122 Stat. 4145, § 221 (Oct. 10, 2008). The Court will not interfere with the Department's entire claims review process based on the general approach

being advanced by the plaintiffs. Effectively, the Court is being asked by the plaintiffs to rewrite legislation passed by Congress, an act which the Court is not permitted to do. *Heckler v. Day*, 467 U.S. 104, 119, 104 S.Ct. 2249, 81 L.Ed.2d 88 (1984) (Where congressional intent not to take specific action is apparent, such as here, "it would be an unwarranted judicial intrusion into this pervasively regulated area for [a] federal court[ ] to issue [an] injunction[ ] imposing [upon the Department] deadlines with respect to future disability claims."). The plaintiffs "cannot seek *wholesale* improvement of [a] program by [such a] court decree, rather ... [their redress lies] in the offices of the Department or the halls of Congress[ ] where programmatic improvements are normally made." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004); *see Lujan*, 497 U.S. at 891. Separation of powers principles demand nothing less.

While the Court is not unsympathetic to the plight of the nation's veterans who are in need of disability benefits, considering their noble and unselfish service to the nation, the Court is nevertheless powerless to award the plaintiffs the relief are they seeking given the limited role the judiciary plays in our governmental system.

Accordingly, it is hereby

ORDERED that the defendant's motion to dismiss is **GRANTED,** and this case is **DISMISSED.**

SO ORDERED.

U.S. Constitution Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or in-junctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, inter-pret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

38 U.S.C. § 511. Decisions of the Secretary; finality

(a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(b) The second sentence of subsection (a) does not apply to--

(1) matters subject to section 502 of this title;

(2) matters covered by sections 1975 and 1984 of this title;

(3) matters arising under chapter 37 of this title; and

(4) matters covered by chapter 72 of this title.

38 U.S.C. § 7101A. Members of Board: appointment; pay; performance review

(a)(1) The members of the Board of Veterans' Appeals other than the Chairman (and including the Vice Chairman) shall be appointed by the Secretary, with the approval of the President, based upon recommendations of the Chairman.

(2) Each member of the Board shall be a member in good standing of the bar of a State.

(b) Members of the Board (other than the Chairman and any member of the Board who is a member of the Senior Executive Service) shall, in accordance with regulations prescribed by the Secretary, be paid basic pay at rates equivalent to the rates payable under section 5372 of title 5.

(c)(1)(A) The Chairman shall establish a panel to review the performance of members of the Board. The panel shall be comprised of the Chairman and two other members of the Board (other than the Vice Chairman). The Chairman shall periodically rotate membership on the panel so as to ensure that each member of the Board (other than the Vice Chairman) serves as a member of the panel for and within a reasonable period.

(B) Not less than one year after the job performance standards under subsection (f) are initially established, and not less often than once every three years thereafter, the performance review panel shall determine, with respect to each member of the Board (other than the Chairman or a member who is a

member of the Senior Executive Service), whether that member's job performance as a member of the Board meets the performance standards for a member of the Board established under subsection (f). Each such determination shall be in writing.

(2) If the determination of the performance review panel in any case is that the member's job performance as a member of the Board meets the performance standards for a member of the Board established under subsection (f), the Chairman shall recertify the member's appointment as a member of the Board.

(3) If the determination of the performance review panel in any case is that the member's job performance does not meet the performance standards for a member of the Board established under subsection (f), the Chairman shall, based upon the individual circumstances, either--

(A) grant the member a conditional recertification; or

(B) recommend to the Secretary that the member be noncertified.

(4) In the case of a member of the Board who is granted a conditional recertification under paragraph (3)(A) or (5)(A), the performance review panel shall review the member's job performance record and make a further determination under paragraph (1) concerning that member not later than one year after the date of the conditional recertification. If the determination of the performance review panel at that time is that the

member's job performance as a member of the Board still does not meet the performance standards for a member of the Board established under subsection (f), the Chairman shall recommend to the Secretary that the member be noncertified.

(5) In a case in which the Chairman recommends to the Secretary under paragraph (3) or (4) that a member be noncertified, the Secretary, after considering the recommendation of the Chairman, may either--

(A) grant the member a conditional recertification; or

(B) determine that the member should be noncertified.

(d)(1) If the Secretary, based upon the recommendation of the Chairman, determines that a member of the Board should be noncertified, that member's appointment as a member of the Board shall be terminated and that member shall be removed from the Board.

(2)(A) Upon removal from the Board under paragraph (1) of a member of the Board who before appointment to the Board served as an attorney in the civil service, the Secretary shall appoint that member to an attorney position at the Board, if the removed member so requests. If the removed member served in an attorney position at the Board immediately before appointment to the Board, appointment to an attorney position under this paragraph shall be in the grade and step held by the

removed member immediately before such appointment to the Board.

(B) The Secretary is not required to make an appointment to an attorney position under this paragraph if the Secretary determines that the member of the Board removed under paragraph (1) is not qualified for the position.

(c)(1) A member of the Board (other than the Chairman or a member of the Senior Executive Service) may be removed as a member of the Board by reason of job performance only as provided in subsections (c) and (d). Such a member may be removed by the Secretary, upon the recommendation of the Chairman, for any other reason as determined by the Secretary.

(2) In the case of a removal of a member under this section for a reason other than job performance that would be covered by section 7521 of title 5 in the case of an administrative law judge, the removal of the member of the Board shall be carried out subject to the same requirements as apply to removal of an administrative law judge under that section. Section 554(a)(2) of title 5 shall not apply to a removal action under this subsection. In such a removal action, a member shall have the rights set out in section 7513(b) of that title.

(f) The Chairman, subject to the approval of the Secretary, shall establish standards for the performance of the job of a member of the Board (other than the Chairman or a member of the Senior Executive Service). Those standards shall establish

objective and fair criteria for evaluation of the job performance of a member of the Board.

(g) The Secretary shall prescribe procedures for the administration of this section, including deadlines and time schedules for different actions under this section.

38 U.S.C. § 7104. Jurisdiction of the Board

(a) All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.

(b) Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.

(c) The Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department.

(d) Each decision of the Board shall include-

(1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record; and

(2) an order granting appropriate relief or denying relief.

(e)(1) After reaching a decision on a case, the Board shall promptly mail a copy of its written decision to

the claimant at the last known address of the claimant.

(2) If the claimant has an authorized representative, the Board shall--

(A) mail a copy of its written decision to the authorized representative at the last known address of the authorized representative; or

(B) send a copy of its written decision to the authorized representative by any means reasonably likely to provide the authorized representative with a copy of the decision within the same time a copy would be expected to reach the authorized representative if sent by first-class mail.

38 U.S.C. § 7112. Expedited treatment of remanded claims

The Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the Board of any claim that is remanded to the Secretary by the Court of Appeals for Veterans Claims.

38 U.S.C. § 7252. Jurisdiction; finality of decisions

(a) The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

(b) Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of the review shall be limited to the scope provided in section 7261 of this title. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule.

(c) Decisions by the Court are subject to review as provided in section 7292 of this title.

38 U.S.C. § 7261. Scope of review

(a) In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall--

(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;

(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law; and

(4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits

under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall--

(1) take due account of the Secretary's application of section 5107(b) of this title; and

(2) take due account of the rule of prejudicial error.

(c) In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court.

(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Secretary, the Court shall review only questions raised as to compliance with and the validity of the regulation.

38 U.S.C. § 7292. Review by United States Court of Appeals for the Federal Circuit

(a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.

(b)(1) When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court

may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Appeals for Veterans Claims. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Appeals for Veterans Claims, unless a stay is ordered by a judge of the Court of Appeals for Veterans Claims or by the Court of Appeals for the Federal Circuit.

(2) For purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Appeals for Veterans Claims.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals

for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Appeals for Veterans Claims is not in accordance with law, to modify or reverse the decision of the Court of Appeals for Veterans Claims or to remand the matter, as appropriate.

(2) Rules for review of decisions of the Court of Appeals for Veterans Claims shall be those prescribed by the Supreme Court under section 2072 of title 28.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIETNAM VETERANS OF AMERICA 8605 Cameron Street, Suite 400 Silver Spring, MD 20910 and VETERANS OF MODERN WARFARE #33107 PO Box 96503 Washington, D.C. 20090	:	
Plaintiffs,	:	Civil Action No.:
v.	:	
JAMES B. PEAKE, M.D., in his official capacity as SECRETARY OF THE DEPARTMENT OF VETERANS AFFAIRS 810 Vermont Avenue, N.W. Washington, D.C. 20420	:	
Defendant.	:	

DECLARATION OF BOBBY O'DANIEL IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND IN OPPOSITION TO DEFENDANT"S MOTION TO DISMISS

I, BOBBY O'DANIEL, declare under penalty of perjury of the laws of the United States, as follows:

1. The facts of this declaration are based upon my personal knowledge.

2. I am a veteran who served in the U.S. Marine Corps from 1987 to 1992. I am a member of Veterans of Modern Warfare.

3. During my time in the military, I spent eight months in the Gulf during Desert Storm. After I was released from the military, my health began to deteriorate. I suffered from depression, fatigue, aches, and diminishing vision that kept me from holding down a job or maintaining relationships. I have suffered through problems with my kidneys, my immune response system, bone loss, deteriorating cornea, bone aches and PTSD.

4. In 1995, I applied for disability benefits with the Department of Veterans Affairs ("VA"). I did not receive a decision on my initial claim until the summer of 1997. The initial decision rated me as having a ten percent disability. I attempted to reopen my claim on at least four different occasions. Each new submission was met with a denial. I had serious problems with substance abuse, finding adequate housing (I lived in my truck for extended periods of time), domestic relations problems, depression, anxiety and inpatient hospitalization. I became so disillusioned with the process, and burdened by stress, that I gave up. I walked away from the BA and from society and wandered aimlessly around the country.

5. With the help of friends, eventually I was able to return to some sense of a normal life. In October 2007, I reopened my claim with the regional office. Today, more than 14 months later, I am still waiting for the VA to issue a decision.

6. My disability prevents me from working and disability benefits are essential to my finances. I am reliant on my disability benefits for day-to-day living expenses.

7. Having the VA promptly issue a decision would allow me to receive the disability benefits I believe I am entitled to or, at the very least, would remove the uncertainty that remains while I have been awaiting a decision for over a year, on an award to compensate me for disabilities that I sustained more than 15 years ago.

Dated: December 12, 2008

/s/Bobby O'Daniel
Bobby O'Daniel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIETNAM VETERANS OF AMERICA 8605 Cameron Street, Suite 400 Silver Spring, MD 20910	:	
and	:	
VETERANS OF MODERN WARFARE #33107 PO Box 96503 Washington, D.C. 20090	:	
Plaintiffs,	:	Civil Action No.: 08-1334 (RBW)
v.	:	
JAMES B. PEAKE, M.D., in his official capacity as SECRETARY OF THE DEPARTMENT OF VETERANS AFFAIRS 810 Vermont Avenue, N.W. Washington, D.C. 20420	:	
Defendant.	:	

DECLARATION OF KEITH KING IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I, KEITH KING, declare under penalty of perjury of the laws of the United States, as follows:

1. The facts of this declaration are based upon my personal knowledge.

2. I am a veteran who served in the U.S. Army from 1969 to 1971. I am a member of Vietnam Veterans of America.

3. During my time in the military, I spent 11 months in Vietnam.

4. I have been receiving disability benefits for various health issues related to my service in Vietnam. However, in September 2007 and July 2008, I made two additional claims for disability benefits for new problems associated with Agent Orange. I have not received a decision on either claim, the first one having been made over 14 months ago.

5. Having the VA promptly issue a decision would allow me to receive the disability benefits I believe I am entitled to or, at the very least, would remove the uncertainty that remains while I have been awaiting a decision for over a year.

Dated: December 11, 2008

s/ Keith K. King

Keith King

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIETNAM VETERANS OF AMERICA 8605 Cameron Street, Suite 400 Silver Spring, MD 20910 and VETERANS OF MODERN WARFARE #33107 PO Box 96503 Washington, D.C. 20090	:	
Plaintiffs,	:	Civil Action No.:
v.	:	
JAMES B. PEAKE, M.D., in his official capacity as SECRETARY OF THE DEPARTMENT OF VETERANS AFFAIRS 810 Vermont Avenue, N.W. Washington, D.C. 20420	:	
Defendant.	:	

DECLARATION OF DONALD D. OVERTON, JR. IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I, DONALD D. OVERTON, JR., declare under penalty of perjury of the laws of the United States, as follows:

1. Except where otherwise indicated, the facts of this declaration are based upon my personal knowledge.

My Background

2. I am the Executive Director at the Veterans of Modern Warfare ("VMW"). VMW is a National Chapter forming 501(c)(19) Veterans Service Organization. Our membership is comprised of Active-Duty, National Guard, Reservists, and veterans who have served in the armed forces since August 2, 1990. VMW provides education and information about the benefits veterans and their families have earned.

3. In my capacity as Executive Director of VMW, my responsibilities include providing leadership, direction and vision that will carry forward the mission of VMW. I prepare our strategic posture and planning processes, meet quarterly goals, and supervise all organizing, leadership development and outreach activities. Additional I also manage contractual obligations, administration and finance. My position carries with it the responsibility, with the President and Vice President of VMW, for representing the organization to the public, media, and other agencies.

4. I am a graduate of East Carolina University (BSW, 2001), and am currently pursuing graduate studies at East Carolina University towards a Masters Degree in Public Administration.

5. I entered active duty in February 1989. Upon completion of both Basic Training at Ft. Jackson, South Carolina and Advanced Individual Training at Ft. Gordon, Georgia, I was awarded the Military Occupational Specialty 31K, Combat Signaler. I entered the Airborne School, Ranger Indoctrination Program, High Altitude Low Opening Parachute School, and ultimately was assigned to HHC 3rd Battalion 505th Parachute Infantry Regiment 82nd Airborne Division. In August 1990, I deployed with the Advance Party 82nd Airborne Division to Saudi Arabia in preparation of Operations Desert Shield and Desert Storm. I was wounded in Combat in March 1991, and subsequently medically retired from the military in June 1992.

6. I joined the staff of VMW in 2007, and from that time, until April 2008, served on the National Board of Directors for VMW. In April 2008, I was appointed as, and assumed the responsibilities of, the Executive Director of VMW.

7. In addition, I have over fifteen years of service and leadership in multiple veterans service organizations. This service included working at numerous levels (from the chapter level to the state level) in organizations such the Disabled American Veterans, American Legion, Veterans of Foreign Wars, and Blinded Veterans of America.

The Broken Disability Claims Process & Injury Suffered By Our Members

8. I have personally worked with numerous veterans of the conflicts in Iraq and Afghanistan, many of whom are members of the VMW and who are currently applying for benefits through the Veterans Administration (the "VA") claims process.

9. These veterans have faced significant delays, often of a year or more, from the time that they first applied for disability benefits from the VA, until the time their claims were processed. Appeals of those decisions average more than four years, and we have among our VMW members persons for whom the appeals process has taken more than five years.

10. The extended period of uncertainty that our members endure as to whether, and when, benefits might be awarded, of course causes many of them to be unable to properly plan for the future. To that extent, each and every one of our members who has suffered through the agonizing VA disability claims appeal process has been directly harmed.

11. More importantly, many of these veterans are solely reliant on the award of disability benefits for their day-to-day living, *i.e.*, to provide them and their families with basic necessities like food, shelter and clothing. The extraordinary delays in the processing of their claims have caused them to suffer direct injury in the form of difficulty securing, and/or the loss of, housing, and the overall inability to adequately care for themselves and their families. Needless to day, the psychological harm that flows

from these dire circumstances is severe. Our members have reported that the failure to award disability benefits has contributed to severe depression.

12. My own experience working with members is replete with examples of persons who have endured unreasonably long waits for disability award decisions, and have suffered significant harm as a direct result.

13. Merely by way of example, I have personally worked with a veteran, Roy Briley, who initially applied for disability benefits in the summer of 1992. Mr. Briley did not receive an initial decision until approximately one year later. The initial decision rated him as having 20 percent disability. In the summer of 1993, Mr. Briley immediately filed an appeal and waited two years to receive a decision, which denied his appeal. Mr. Briley attempted to get on with his life by pursuing educational and occupational endeavors. In the fall of 2000, his condition worsened, and Mr. Briley filed for an increased rating. Approximately one year later, his claim was denied. In the summer of 2006, Mr. Briley, who by then was on the brink of homelessness, opted to file for an increased rating. In the spring of 2007, almost one year later, he was finally granted an increase to 40 percent disability. Mr. Briley immediately filed another appeal. In addition, he filed another claim for secondary depression. In the fall of 2008, over one and a half years later, Mr. Briley received a decision and was granted an increase in his rating for secondary depression, but his appeal was once again denied with the threat of a possible decrease in his rating.

14. Mr. Briley, like so many of our other members, has suffered direct injury as a result of the delay in processing his claim. Because at various times during the above described delays he received anywhere from no benefits to benefits that were less than those to which he was entitled, he suffered significant adverse effects, including substance abuse, housing issues, domestic relations problems, and depression.

15. Mr. Briley is but one example of our many members who have been victimized by lengthy and repeated delays in the VA claims process. Based on my experience, unless the VA's delays are remedied, his example will continue to be repeated by the members of VMW. A favorable decision in this lawsuit will redress the harm experienced by those like Mr. Briley, either by providing them with benefits promptly or, at a minimum, by removing the cloud of uncertainty that hinders their abilities to plan for the future and move forward with their lives.

Conclusion

16. For the reasons set forth above, our disabled members are being directly harmed by the VA's delay in processing their benefits applications. If the VA's unreasonable delays were eliminated, our members would be able to better afford the basic necessities that they lack, and have their transitions back into civilian life significantly eased. In other words, their harm would be redressed.

Dated: December 11, 2008

/s/Donald D. Overton, Jr.
Donald D. Overton, Jr.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIETNAM VETERANS OF AMERICA 8605 Cameron Street, Suite 400 Silver Spring, MD 20910	:	
and	:	
VETERANS OF MODERN WARFARE #33107 PO Box 96503 Washington, D.C. 20090	:	
Plaintiffs,	:	Civil Action No.:
v.	:	
JAMES B. PEAKE, M.D., in his official capacity as SECRETARY OF THE DEPARTMENT OF VETERANS AFFAIRS 810 Vermont Avenue, N.W. Washington, D.C. 20420	:	
Defendant.	:	

DECLARATION OF RICHARD F. WEIDMAN IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I, RICHARD F. WEIDMAN, declare under penalty of perjury of the laws of the United States, as follows:

1. Except where otherwise indicated, the facts of this declaration are based upon my personal knowledge.

My Background

2. I am the Executive Director for Policy & Government Affairs at the Vietnam Veterans of America (the "VVA"). In that capacity, I am responsible for all relations with the Executive branch of the U.S. Government, including the Department of Veterans Affairs, the Department of Defense, the Department of Labor, the Office of Personnel Management, the Office of Management & Budget, The White House, and other Federal entities as the need arises, to advocate and educate them as to the vital needs and interests of veterans of all generations, and particularly disabled veterans. Additionally, I work with the elected leadership and other VVA staff to write testimony and to educate Members of Congress and their staff as to the issues facing veterans and their families.

3. I am a graduate of Colgate University (B.A., 1967), and thereafter pursued graduate studies at the University of Vermont. In the 1970s, I was an instructor and administrator at Johnson State College in Vermont. At that time, I became very active in community and veterans affairs.

4. I joined the staff of the VVA in 1979, and from that time, until 1987, served variously as

Membership Service Director, Agency Liaison, and Director of Government Relations. Prior to rejoining the VVA in 1998, I served in the Administration of New York Governor Mario M. Cuomo as statewide director of veterans' employment & training (State Veterans Programs Administrator) for the New York State Department of Labor.

5. In addition, I have served as Consultant on Legislative Affairs to the National Coalition for Homeless Veterans (NCHV), and also served at various times on the VA Readjustment of Combat Veterans Advisory Committee, the Secretary of Labor's Advisory committee on Veterans Employment & Training, the President's Committee on Employment of Persons with Disabilities – Subcommittee on Disabled Veterans, the Advisory Committee on Veterans' Entrepreneurship at the Small Business Administration, and held numerous other advocacy posts in veterans affairs.

The VVA

6. The VVA was federally charted by Congress in 1986. It is a non-profit membership and advocacy organization dedicated to promoting the social welfare of Vietnam-era veterans and other veterans, and their families, in the United States by encouraging their growth, development, readjustment, self-respect, self-confidence and usefulness." Toward that end, the VVA supports veterans of all U.S. wars and conflicts. The founding principle of VVA is "Never again shall one generation of American veterans abandon another." VVA has more than 58,000 members in 686 chapters.

The Broken Disability Claims Process & Injury Suffered By Our Members

7. I have personally worked with, and am familiar with the records of, numerous veterans of the conflicts in Vietnam, Iraq and Afghanistan who are members of our organization and who are currently applying for benefits through the Veterans Administration (the "VA") claims process.

8. These veterans have faced significant delays, often of a year or more, from the time that they first applied for disability benefits from the VA until the time their claims were processed. Appeals of those decisions average more than four years, and we have among our VVA members persons for whom the appeals process has taken more than ten years.

9. The extended period of uncertainty that our members endure as to whether, and when, benefits might be awarded, of course causes many of them to be unable to properly plan for the future. To that extent, each and every one of our members who has suffered through the agonizing VA disability claims appeal process has been directly harmed.

10. More importantly, many of these veterans are solely reliant on the award of disability benefits for their day-to-day living, *i.e.,* to provide them and their families with basic necessities like food, shelter and clothing. The extraordinary delays in the processing of their claims have caused them to suffer direct injury in the form of difficulty securing, and/or the loss of, housing, and the overall inability to adequately care for themselves and their families. Needless to say, the psychological harm that flows from these dire circumstances is severe. Our

members have reported that the failure to award disability benefits has contributed to severe depression.

11. Both our VVA records, and my own experience working with our members and other veterans, are replete with examples of persons who have endured unreasonably long waits for disability award decisions, and have suffered significant harm as a direct result.

12. Merely by way of example, I personally worked with Veteran "A," a veteran from a western state who prefers that his name not be made public. He had a clear cut case of PTSD, and clear-cut documentary evidence of a stressor; nevertheless, his case languished for three years at his local regional office, and then he was rejected. He filed a Notice of Disagreement, and it took more than eight months for the Regional Office to certify his appeal and send it to the Board of Veterans Appeals ("BVA"). It sat there for another three and one-half years, before I interceded with top VA officials to request that they ask the BVA to simply do their job and give this veteran an answer. All told, Veteran A waited more than seven years, during which time he lost his house (as he was unable to work), and had to move his family into an abandoned trailer with no electricity in order to survive. He was ultimately awarded his claim outright.

13. Another veteran, whom I have work with for some years, and who, because he prefers that his name not be made public, I will call Veteran "B," was grievously wounded in Vietnam and was even reported killed-in-action to his family. He came

out of a coma two weeks later at a military hospital in Japan. He was hospitalized for more than two years at Walter Reed Army Medical Center upon his return to Washington, D.C. He underwent further treatment at the VA hospital in Washington, D.C. upon his separation from military service. As he has aged, even though he continues to work hard at regularly physical therapy, his skeletal structure has been breaking down to the extent that he can no longer maintain it with the musculature. Further, he finally began to seek assistance dealing with PTSD (for which he receives ongoing treatment). He applied to the VA for the additional conditions that have manifested, including difficulty walking (he often require two canes now), and has been told that conditions, such as repairing the hole in his now-enlarging septum (the original hole was cut in connection with a medical procedure to enable a wire to run from his left cheek bone to his right cheek bone so that his face and skull could literally be wired back together), was not developed during or as a result of his service. He has been turned down at the regional office level for disability benefits for most of these secondary conditions, as it refuses to believe that he as run over by a tank and survived, even though there is ample documentary evidence that this was the case. After more than two years, Veteran B he is still waiting his appeal to be considered at BVA. He has suffered direct injury as a result of the delay in processing his claim. This has led to significant adverse effects, not the last of which is the indignity of being told that his wounds have nothing to do with his service as an infantryman in Vietnam. The delays have

exacerbated an already problematic acute depression that threatens his overall health and well being.

14. A favorable decision in this lawsuit will redress the injuries caused by the lengthy delays that the above-described veterans, like so many of the VVA's members, have experienced, either by providing them with prompt benefits that will assist them in their day-to-day living, or, at a minimum, by removing the cloud of uncertainty that hinders their abilities to plan for the future and move forward with their lives.

Conclusion

15. For the reasons set forth above, our disabled members are being directly harmed by the VA's delay in processing their benefits applications. If the VA's unreasonable delays were eliminated, our members would be able to better afford the basic necessities that they lack, obtain the medical care that they need, and have their transitions back into civilian life significant eased. In other words, their harm would be redressed.

Dated: December 11, 2008

/s/ Richard F. Weidman
Richard F. Weidman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIETNAM VETERANS OF AMERICA 8605 Cameron Street, Suite 400 Silver Spring, MD 20910	:	
and	:	
VETERANS OF MODERN WARFARE #33107 PO Box 96503 Washington, D.C. 20090	:	
Plaintiffs,	:	Civil Action No.:
v.	:	
JAMES B. PEAKE, M.D., in his official capacity as SECRETARY OF THE DEPARTMENT OF VETERANS AFFAIRS 810 Vermont Avenue, N.W. Washington, D.C. 20420	:	
Defendant.	:	

DECLARATION OF JOHN P. DORRITY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

1. The statements offered in this declaration are based on my personal knowledge, opinion and experience.

2. I have served the population of United States Armed Services Veterans as a representative and advocate in proceedings before the Veterans Administration ("VA") since 1982. I am an accredited Veteran's representative and I practice through a local government entity, the Ocean County Veterans Service Bureau ("OCVSB") in New Jersey. Currently, I am the Director of the OCVSB and have served in that capacity since 2003. Prior to that, I was the Assistant Director of OCVSB from 1992 through 2003.

3. OCVSB includes a staff of nine accredited National Association of County Veterans Service Officers ('NACVSO") representatives and five support staff, all of whom I supervise in their representation of Veterans in matters pending before the VA.

4. I have been prosecuting Veterans claims since 1985. I began this on an informational basis as a VVA chapter and VFW District service officer. I have been certified through VVA and NACVSO since 1992. I prosecute claims through various VA Regional Offices (hereinafter referred to as "ROs") around the United States and before the Board of Veterans Appeals ("BVA") Travel Board. In addition, on behalf of Veterans I have forwarded their claims *pro se* to the Court of Appeals for Various Claims ("CAVC").

5. In the last 12 months, I have represented approximately 175 Veterans with their

claims before the BVA Travel Board. Overall, I represent approximately 3,000 claimants on various issues through the OCVSB located in Toms River, New Jersey.

6. I am a Past President of NACVSO, having served in that capacity from 2004-2005. NACVSO is a private, non-profit organization, dedicated to the concept of standardized training for all Veteran's representatives. I was initially certified through VVA as an accredited representative at the VA in approximately 1992. I resigned that accreditation in 1998 and became certified through NACVSO as an accredited Veterans representative in 2000.

7. I have served on the NACVSO executive board since 1995 as both an appointed committee member and elected board member. I have served on their education committee since 1995. I developed and implemented the Certified Veterans Advocate ("CVA") instructional program in 1999. This training is likened to a graduate program and is limited to CVSOs with particular criteria required to attend (including 5 years experience prosecuting VA claims and development and implementation of a local program beneficial to Veterans, etc.) I presently hold the professional designation of CVA from NACVSO. I am one of six holders of that professional designation in the United States. In addition, I am the head trainer in this program which is instruction offered at the annual NACVSO training and business conference. I also train initiates and provide continuing education at the NACVSO national conference.

8. I also serve as the National Service Director for NACVSO, a position I have held since 2005. In that capacity, I certify and maintain accreditation for over 1,000 County Veteran Service officers. In this capacity, I also represent claimants at various ROs around our nation and assist my local NACVSO representatives in their presentations at personal hearings, Decision Review Officer hearings, and BVA Travel Board hearings held within the jurisdiction of their respective ROs.

9. I have conducted national Veteran's surveys and research as Chair of the AMVETS Homeless Veterans Committee. Specifically, I undertook a study for the 2006 AMVETS National Symposium on the needs of OEF/OIF Veterans. I also performed extensive research and studies for the New Jersey State Council of VVA from 1990-1995 with respect to homeless Veterans through field visits, and at the New England Shelter for Homeless Veterans and other homeless Veterans programs in Massachusetts and New Jersey for the purpose of developing or replicating existing programs that stabilize the homeless Veterans and assist in securing these Veterans' monetary, health and academic entitlements, both from the VA and state agencies.

10. I am the president of the New Jersey Association of Veterans Service Officers, a position I attained in 1999. I teach the appeals aspect of VA claims as a contract trainer through my affiliation with the core cadre of NACVSO trainers. I also instruct on continuing education with respect to Title 38 of the United States Code and applicable federal regulations.

11. I am the head trainer for the Center for Post Traumatic Studies ("CPTS"), a private, for profit training and consulting group. CPTS provides training for private and public non-profit agencies vis a vis diagnosis, treatment and available resources to those agencies through VA. We conduct training sessions with interested agencies on Veteran's entitlements. We also provide forensic research and reports relative to individual Veteran's claims. We are also presently involved in a jail diversion program with the local judicial vicinage, whose purpose is to direct Veterans to treatment facilities rather than incarceration. Currently, CPTS is under contract with the state of New Jersey, training all agencies under the jurisdiction of the New Jersey Department of Human Resources, New Jersey Division of Mental Health. CPTS is also under contract to provide training to he New Jersey Association of Mental Health, a private non-profit organization, with respect to Veteran's entitlements which may be applicable to their client population.

12. I developed, wrote and implemented, along with several other Veterans, the New Jersey PTSD Readjustment Program for the New Jersey Department of Military and Veterans Affairs ("NJ DMAVA") in 1987. This program of rehabilitation has been replicated by other states due to its rate of success in returning Veterans to financial security, mental and physical health, and academic parity with the non-Veteran population of society. NJ DMAVA administers and funds the readjustment program in the amount of approximately $1.3 Million Dollars annually.

13. I hold a Master of Social Work degree from Fordham University, New York, with a concentration in administration and a minor in clinical social work. I counsel Veterans, and family members of Veterans, with PTSD as an associate of Evers Psychological Associates. As a therapist, I and an associate currently have 16 patients in weekly individual counseling sessions under the NJ DMAVA PTSD Rehabilitation Program at our out station in Atlantic county, NJ. Our main office, in Monmouth County, NJ presently treats approximately 100 Veterans in individual and group therapy.

14. I was an adjunct Professor at Ocean County College from 1998-2007. I taught over 1,000 students Sociology, Social Program, Crisis Intervention and Interviewing Techniques. I participated in many research projects and surveys geared to the overall student population and the Veterans population within that institute of learning.

15. According to the VA's Monday Morning Workload Report dated 10/25/2008, 857,975 cases nationally are currently pending before the VA. This number does not reflect claims submitted or resolved after 10/25/2008.

16 According to 38 CFR, subsection 3.159(c), the VA has a "Duty to assist" in the development and resolution of the individual claimant's issue(s). Also, according to 38 U.S.C., subsection 5107(b), the VA should observe the doctrine of "Benefit of the Doubt" more stringently as it pertains to the Veterans claimant's issue.

Under these subsections, expeditious service should be paramount in the prosecution of a claim.

17. Contrary to VA statements and data, with respect to the issue of timeliness in the prosecution of a claim (that it takes 180 days, or less, to arrive at a decision), it has been my personal observation and experience, as a Veteran's representative of the last 25 years, that the average time to prosecute an initial claim is at least on (1) year.

18. If an unfavorable decision is rendered by the VA at the RO level, than a Notice of Disagreement must be filed by the claimant, in order to maintain the integrity of the time frame of the claim. This segment of the claims process generally takes an additional one year. If this initial determinative process is unfavorable, a substantive appeal must be filed in a timely manner. On national average, an appeal takes anywhere from 2 ½-3 ½ years to be heard. A BVA Travel Board hearing can take longer due to inefficient scheduling a the local RO.

19. I have personally represented Veterans whose claims have been in the adjudicative process for 11 years and longer. Over the last 26 years, it has been my sad experience to represent over sixty (60) claimants who have died, either from service-connected issues or suicide, while their claims languished within the VA, awaiting a determination.

20. Under 38 CFR, subsection 3.159(c), "Duty to Assist" and the Veterans Claim Assistance Act of 2000, the VA is required to secure all documents, held by Federal agency, relative to the

prosecution of the claim in order to render fair adjudication at the RO level. However, as a Veteran's representative over the last 26 years, I have experienced various ROs not perform this vital task. As a result, a critical element in developing a Veteran's claim is, in these circumstances, not completed as required leaving that Veteran at a disadvantage in the process.

21. The economic and social ramifications of the claims prosecution system are broad and wide-reaching. It is not unusual for me to see the claimant's whole environment change drastically over the prolonged period of time from the time when the initial claim is filed until its final outcome. Los of work, home, health and family are not uncommon events in the claimant's life. The impact expands far beyond the Veteran—to spouses, children and other family members. In a sense, I view the cumbersome claims process as an exacerbation of the Veteran claimant's symptomology. The bureaucracy makes a bad situation worse. Homelessness, depression and suicide are a few of the tragic consequences of this red-tape that I have observed in my years of work as a Veteran's representative. Moreover, in my experience, the situation has gotten worse each year. With millions of newly-returning Veterans, it is my opinion as a seasoned Veterans representative that the already broken system, without change, will simply decline further.

I declare under penalty of perjury under the laws of the State of New Jersey that the foregoing is true and correct. Executed this 7th day of November, 2008 at Toms River, New Jersey.

/s/John P. Dorrity
JOHN P. DORRITY MSW,CVA

No. 09-1541

In the Supreme Court of the United States

VIETNAM VETERANS OF AMERICA, ET AL.,
PETITIONERS

v.

ERIC K. SHINSEKI, SECRETARY OF
VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

WILLIAM KANTER
CHARLES W. SCARBOROUGH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether veterans' organizations that have disclaimed any request for individual relief for any of their members have Article III standing to challenge alleged systemic delays in claims processing by the Department of Veterans Affairs.

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In the Supreme Court of the United States

No. 09-1541

VIETNAM VETERANS OF AMERICA, ET AL., PETITIONERS

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 599 F.3d 654. The opinion of the district court (Pet. App. 18-25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2010. The petition for a writ of certiorari was filed on June 17, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has created a comprehensive scheme for providing disability benefits to veterans. The system of hearings, administrative appeals, and judicial review ensures that veterans have many opportunities to present their claims and to correct any error made in initial

determinations by the Department of Veterans Affairs (VA). See generally 38 U.S.C. 7101-7299.

A veteran must first submit a claim to one of 57 regional offices located around the country. See Pet. App. 2. The hearings at this stage are non-adversarial. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 309-310 (1985). Upon receipt of a substantially complete application for benefits, the VA must notify the veteran of the information necessary to substantiate the claim. 38 U.S.C. 5103(a)(1). The VA is required by statute to assist the veteran in obtaining all records relevant to the veteran's benefits claim and, when necessary, to provide a medical examination to assist the veteran in presenting the claim. 38 U.S.C. 5103A.

If a veteran is dissatisfied with the regional office's initial determination, he may appeal to the Board of Veterans' Appeals by filing a notice of disagreement. 38 U.S.C. 7105(a), 7107. Upon receipt of such notice, the regional office that reviewed the claim must prepare a more detailed explanation of its decision and provide that explanation to the veteran and his representative. 38 U.S.C. 7105(d). The record remains open at all times, and the veteran is entitled to a hearing before the Board makes its decision. 38 U.S.C. 7107(b).

A Board decision adverse to the claimant may be further appealed to the United States Court of Appeals for Veterans Claims (CAVC), a judicial body wholly independent of the VA. 38 U.S.C. 7252, 7253. The CAVC has authority to decide all legal issues, including constitutional claims, 38 U.S.C. 7261(a)(1), and is specifically authorized to compel action that the VA has "unlawfully withheld or unreasonably delayed." 38 U.S.C. 7261(a)(2); see *Erspamer* v. *Derwinski*, 1 Vet. App. 3, 7 (1990) (confirming that the CAVC has authority to grant

a writ of mandamus compelling the VA to take action that has been "unreasonably delayed"). Decisions of the CAVC may be further appealed to the United States Court of Appeals for the Federal Circuit, which is authorized to "decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. 7292(d)(1).

This system is the exclusive method of judicial review of VA benefits decisions. Congress has divested all other courts of authority to review such claims by directing the Secretary of Veterans Affairs to decide "all questions of law and fact necessary to a decision * * * under a law that affects the provision of benefits," and by providing that such decisions "may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise," except in accordance with the system of review described above. 38 U.S.C. 511(a).[1]

2. Petitioners Vietnam Veterans of America and Veterans for Modern Warfare, two veterans advocacy groups, filed a complaint in federal district court alleging system-wide delays in the VA's processing of benefits claims. Pet. App. 5-6. Asserting claims under the Administrative Procedure Act (APA), the Due Process Clause, and statutes directing the VA to act expeditiously in processing remanded benefits claims, petitioners sought an injunction requiring the VA to render "an initial decision on every veteran's claim for benefits within 90 days" and "to 'ensure that appeals of claims decisions are resolved within 180 days.'" *Id.* at 6 (quoting Compl. para. 88(a)-(b)). Petitioners sought only that

[1] Section 511 also provides for Federal Circuit review of VA rules and regulations, and excepts from its bar certain life insurance, housing, and loan matters not relevant here. 38 U.S.C. 511(b)(1)-(3).

structural remedy, and they explicitly disclaimed any request for relief for individual members whose claims had been delayed. See *ibid.* ("Nothing in this complaint is intended to, nor should it be construed as, an attempt to obtain review of an individual determination by the VA or its appellate system.") (quoting Compl. para. 16); see also Pet. 4 ("Petitioners do not challenge any particular decision made by the Secretary nor do they seek any specific decision in any particular case.").

The government moved to dismiss the complaint on several independent but related grounds. As principally relevant here, the government argued that petitioners lacked standing. The government noted that associational standing requires that at least one individual member of the plaintiff organizations have standing to bring the claims, and it contended that petitioners' express disclaimer of relief for any particular individual precluded them from satisfying that requirement. Gov't Memo. in Supp. of Mot. to Dismiss 15-17. The government also argued that petitioners' suit was barred on two statutory grounds: first, by 38 U.S.C. 511, which provides that the CAVC has exclusive jurisdiction to review "all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits," including preliminary decisions about when claims should be processed; and second, by the APA, which provides that a district court has jurisdiction to review agency action only when there is "no other adequate remedy in a court," 5 U.S.C. 704. Gov't Memo. in Supp. of Mot. to Dismiss 17-24. The government argued that Section 704 was not satisfied in this case because judicial review in veterans' benefits cases is available through the CAVC and the Federal Circuit. *Id.* at 20-21.

In an unpublished order, the district court granted the government's motion to dismiss the complaint for lack of standing. Pet. App. 18-25.

3. The court of appeals affirmed. Pet. App. 1-17. The court noted that the Sixth and Eighth Circuits have found unreasonable-delay claims by individual veterans to be non-cognizable under the APA, see 5 U.S.C. 704, because "any veteran can bring an unreasonable delay action in the CAVC." Pet. App. 10. While stating that the holdings of those courts "appear[] to be unassailable," *id.* at 11, the court of appeals declined to decide the case on that basis because it viewed the bar imposed by Section 704 as non-jurisdictional, see *id.* at 14-15.

The court of appeals instead affirmed the dismissal of petitioners' complaint on the ground that petitioners lacked Article III standing. Pet. App. 15-17. The court explained that petitioners, "in a rather apparent effort to avoid the preclusive bite of both [38 U.S.C.] 511 and [5 U.S.C.] 704," had gone "out of their way to foreswear any individual relief" for particular members of their organizations. *Id.* at 15-16. The court of appeals observed that "an association has standing to sue only if at least one member would have standing on his or her own right," *id.* at 15, and it concluded that petitioners could not satisfy that requirement.

The court of appeals recognized that petitioners, in an effort to demonstrate concrete injury from the VA's allegedly slow claims processing, had "produced affidavits of members whose cases were pending--in their view, much too long." Pet. App. 15. The court concluded, however, that those allegations of unreasonable delay in individual cases did not establish standing to seek the relief sought by petitioners: a system-wide injunction to reduce the average length of time expended

in processing veterans benefits claims. See *id.* at 15-16. The court observed that "the average processing time does not cause affiants injury; it is only their processing time that is relevant." *Id.* at 16. By way of example, the court explained that if "affiants fell at the quick-processing end of a bell-shaped curve, a high average processing time would be irrelevant to them," and that "a low average would not avoid injury if affiants were at the other side of the curve." *Ibid.* Thus, the court reasoned, petitioners had brought "a claim not for [affiants] themselves but for others, indeed, an unidentified group of others." *Ibid.* Because "one can not have standing in federal court by asserting an injury to someone else," the court concluded that petitioners lacked standing. *Ibid.* (citing *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 108-109 (1983)).

ARGUMENT

Petitioners argue that the decision below conflicts with this Court's decisions regarding associational standing and with the decisions of other courts of appeals regarding the scope of 38 U.S.C. 511. Those contentions are without merit, and further review is not warranted.

1. Petitioners' complaint was properly dismissed for lack of standing. Petitioners concede that an association has standing to sue only when "at least one member would have standing to sue in his own right." Pet. 16 (citing *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 342-343 (1977)). Petitioners' standing therefore depends on the existence of a member whose "concrete and particularized" injury would be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (quoting *Simon* v.

Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)). Because petitioners chose to disclaim any request for relief for any of their individual members, the dismissal of their suit was a routine and fact-bound application of these settled principles.

Petitioners' complaint contains no allegations of delay in the processing of any particular benefits claim. Pet. App. 16. To the contrary, petitioners specifically declared that "[n]othing in this complaint is intended to, nor should it be construed as, an attempt to obtain review of an individual determination by VA or its appellate system." *Id.* at 6 (quoting Compl. para. 16). Petitioners have reiterated that position in this Court. See Pet. 4 ("Petitioners do not challenge any particular decision made by the Secretary nor do they seek any specific decision in any particular case.").

Petitioners allege only that the VA's claim-processing procedures are, in general, unlawfully slow, and they seek injunctive relief requiring that the VA act on claims within uniform, judicially-imposed deadlines. As the court of appeals explained, petitioners appear to have limited their request for relief in that manner in an "effort to avoid the preclusive bite of both [38 U.S.C.] § 511 and [5 U.S.C.] § 704," Pet. App. 16, which together make clear that a challenge to the VA's processing of individual veterans' benefits claims may not be brought in district court. By disclaiming any potential challenge to the VA's handling of any particular veteran's claim, however, and by instead directing their challenge at the VA's overall administration of the veterans' benefits scheme, petitioners have run afoul of Article III's "case or controversy" requirement.

Article III standing requirements rest in part on the principle that it is the responsibility of the Executive,

not the courts, to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3; see *Lujan*, 504 U.S. at 577 (explaining that Article III courts may not usurp "the Chief Executive's most important constitutional duty."). For this reason, no individual member of petitioners' organizations would have had standing to bring a suit that disavowed any request for relief in his specific case while insisting that the VA, on the whole, was taking too long to process claims. See *id.* at 560 n.1 ("[T]he injury must affect the plaintiff in a personal and individual way."). As the court of appeals recognized, even "assuming the alleged illegality—that the average processing time at each stage is too long—that 'illegality' does not cause [any particular individual] injury." Pet. App. 16.

An individual claimant suffers injury only if the processing of *his* claim is unlawfully delayed, an injury that petitioners have not asked any court to redress. Petitioners' suit seeks to enforce "only the right, possessed by every citizen, to require that the Government be administered according to law," which this Court has long held "does not entitle a private citizen to institute in the federal courts a suit." *Fairchild* v. *Hughes*, 258 U.S. 126, 129-130 (1922). An individual litigant who complained only of average claim-processing time would be "presenting a claim not for [himself] but for others, indeed an unidentified group of others." Pet. App. 16 (citing *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 108-109 (1983)).

Petitioners argue (Pet. 16-17) that the court of appeals ignored affidavits in the record that provide examples of individual members who had suffered delay in the processing of their claims. Petitioners do not, however, seek relief for any of those affiants; rather, their

complaint explicitly declares these affidavits to be merely "illustrative." Pet. App. 6 (quoting Compl. para. 16). Had these affiants brought suit in district court (either in their own name or as part of an association) to redress delays in the processing of their own cases, the Article III standing inquiry would be different (though 38 U.S.C. 511 would still bar the suit); but the affiants have not pursued any such claims. Far from ignoring petitioners' affidavits, the court of appeals parsed them with care but concluded that they failed to establish petitioners' Article III standing because petitioners "went out of their way to forswear any individual relief for the affiants." Pet. App. 16.

2. The decision below does not conflict with the holding of any other court of appeals. Two other circuits have considered lawsuits founded on similar allegations of systemic delay in the VA's processing of benefits claims. Both of those courts dismissed the plaintiffs' suits, though on statutory rather than constitutional grounds. See *In re Russell*, 155 F.3d 1012, 1013 (8th Cir. 1998) (per curiam); *Beamon* v. *Brown*, 125 F.3d 965, 967-974 (6th Cir. 1997).[2]

Petitioners assert (Pet. 20) that there is a disagreement among the circuits about the scope of the jurisdiction-limiting provisions of 38 U.S.C. 511. But this case is not an appropriate vehicle to address the

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[2] Petitioners cite *Veterans for Common Sense* v. *Nicholson*, 563 F. Supp. 2d 1049 (N.D. Cal. 2008) (*VCS*), appeal pending, No. 08-16728 (9th Cir. argued Aug. 12, 2009), for the proposition that organizational plaintiffs have standing to seek relief for systemic delays in the processing of VA benefits claims. Pet. 19. The district court in *VCS* did reject the government's standing argument, but the court held that 38 U.S.C. 511 divested it of jurisdiction over such claims. 563 F. Supp. 2d at 1083-1084.

coverage of Section 511 because the court below did not decide it. See Pet. App. 10. Petitioners argue (Pet. 20) that the court of appeals "[b]y necessity" decided the Section 511 question in its discussion of standing. That is incorrect. The court of appeals explained that there was "tension between" two lines of D.C. Circuit authority regarding the preclusive scope of Section 511, Pet. App. 10; see *id.* at 7 10, and it concluded that it "need not seek to resolve the tension between [its] cases" on that issue, *id.* at 10, because another ground of decision was available. The court of appeals affirmed the dismissal of petitioners' suit on the basis of standing alone. See *id.* at 15-16. This Court "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). Because the court of appeals declined to rely on Section 511 as a ground for its decision, the fact that the court of appeals discussed Section 511 at all was a "mere fortuity." *Ibid.*

3. Finally, petitioners contend (Pet. 24) that the decision below raises a "serious constitutional question" under *Webster* v. *Doe*, 486 U.S. 592, 603 (1988), because it deprives benefits claimants of review of constitutional challenges to claim-processing delays. According to petitioners, judicial review of issues relating to veterans' benefits claims by the CAVC and the Federal Circuit is a constitutionally inadequate substitute for review by the district court.

This case is not a suitable vehicle for deciding whether the CAVC and the Federal Circuit provide an adequate forum for constitutional claims, however, because the court of appeals did not decide whether individual veterans' unreasonable delay claims may proceed in district court. As explained above, the court of ap-

peals discussed the statutory issues only in dicta. Pet. App. 11. The court did note that this Court's observation in *Webster*—that a "serious constitutional question * * * would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim," 486 U.S. at 603 (internal quotation marks omitted)—was likely irrelevant in this case because "even if review of the due process claim is not available in the district court, the CAVC could still hear it." Pet. App. 13-14 n.7. Nevertheless, the court of appeals' discussion of this issue was only "tentative" because the court dismissed petitioners' complaint solely for want of standing. *Id.* at 14.

In any event, the scheme that Congress has created for reviewing VA benefits decisions does provide a judicial forum in which a colorable constitutional claim can be heard. The CAVC may "decide all relevant questions of law," including whether "decisions * * * rules, and regulations" of the VA are "contrary to constitutional right." 38 U.S.C. 7261(a)(1) and (3)(B). The CAVC is also authorized to "compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. 7261(a)(2). A veteran may seek further review in the Federal Circuit, which has jurisdiction to consider all challenges to VA regulations and constitutional issues that arise in the course of the VA's adjudication of benefits claims. 38 U.S.C. 502, 7292(d).

Petitioners cite *Dacoron* v. *Brown*, 4 Vet. App. 115, 119 (1993), for the proposition that the CAVC "affords no * * * right of review to veterans seeking relief from the VA's delays." Pet. 25. Although the court in *Dacoron* confirmed the general rule that constitutional claims should be presented to the CAVC "in the context of a proper and timely appeal taken from such a decision

made by the VA Secretary through the [Board]," *ibid.* (quoting *Dacoron*, 4 Vet. App. at 119), the requirement of a final appealable decision does not apply when the plaintiff seeks an extraordinary writ such as mandamus. *Dacoron*, 4 Vet. App. at 119. To the contrary, the CAVC has held that it has jurisdiction to issue a writ compelling the VA to take action that has been "unreasonably delayed." *Erspamer* v. *Derwinski*, 1 Vet. App. 3, 7 (1990) (citation omitted). This is the same power that the APA authorizes district courts to exercise with respect to other federal agencies. 5 U.S.C. 706(1); see Pet. App. 11 (explaining that "the CAVC possesses the exact same authority to deal with excessive delay in its statute that district courts have under the APA").[3] Accordingly, Section 511's directive that specific statutory mechanisms be used to challenge VA benefit determinations is fully consistent with this Court's concern in *Webster* that there be a "judicial forum for a colorable constitutional claim." 486 U.S. at 603.

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[3] Petitioners assert that, even if the CAVC may issue writs of mandamus compelling actions by the Board to prevent unwarranted delays on appeal, the CAVC will refuse to issue mandamus orders compelling expedited action by the regional offices. Pet. 26. That is incorrect. In *Erspamer*, the CAVC recognized its authority to issue a writ of mandamus where "the inadvertent or intentional failure of [the VA] to act prevents a claimant from ever attaining a [Board] decision which would be subject to review." 1 Vet. App. at 7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

WILLIAM KANTER
CHARLES W. SCARBOROUGH
Attorneys

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IN THE
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VIETNAM VETERANS OF AMERICA AND
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ERIC K. SHINSEKI, IN HIS OFFICIAL CAPACITY
AS SECRETARY OF THE DEPARTMENT OF
VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

REPLY BRIEF OF PETITIONERS

Robert E. Cattanach
Counsel of Record
Dorsey & Whitney LLP
50 S. Sixth Street, Suite 1500
Minneapolis, MN 55402
(612) 340-2600
cattanach.robert@dorsey.com

Counsel for Petitioners

September 7, 2010

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ARGUMENT

Respondent Secretary of the Department of Veterans Affairs (hereinafter the "VA"), like the D.C. Circuit, confuses "individual *relief*" with "individual *review*." In so doing, both the VA and the D.C. Circuit misapply this Court's associational standing decisions to reach a result that conflicts with those decisions.

The VA asserts that Petitioners do not have standing because they have not asked for review of any individual decision to grant or deny benefits *on the merits*. As the pleadings make clear, however, Petitioners seek injunctive relief for each of their members who, individually, suffer from the VA's chronic delays in reaching *any* decision. The relief Petitioners seek is simply that a prompt decision be made in each of their members' cases (whatever the outcome on the merits). The unreasonable delay in the issuance of those individual decisions is the basis of Petitioners' claims, and those claims will be redressed if the prompt issuance of a decision is ordered by the courts. Petitioners therefore have standing to assert such claims.

In addition to the important issue of associational standing raised in this appeal, there are three other compelling reasons why review should be granted:

First, the ruling that Congress stripped the Article III courts of the power to hear constitutional claims raised by veterans when it enacted 38 U.S.C. § 511 conflicts with this Court's decision in *Johnson v. Robison*, 415 U.S. 361 (1974).

Second, the importance of review by this Court – and the need for that review to happen now – is

demonstrated by the unbroken line of decisions by the Court of Appeals for Veteran's Claims ("CAVC") over the last twenty years. Despite worsening delays, the CAVC has utterly failed to provide any relief whatsoever to address the violations of constitutional due process pervasive in the VA's disability benefits system.

Third, even assuming the CAVC provides a capable and constitutionally appropriate forum for addressing some claims in certain limited circumstances, Petitioners here are jurisdictionally barred from bringing their claims before that court, and must accordingly rely exclusively on the Article III courts to obtain relief on behalf of their members. The D.C. Circuit's opinion, however, forecloses access to those courts and creates a Catch-22 that effectively bars any judicial review of the VA's systemic delays.

A. Petitioners Have Standing

In order to demonstrate associational standing, Petitioners must show that at least one of their members is "suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1977). Petitioners' Complaint and the supporting declarations of their members alleged such injury by highlighting the delays suffered by individual declarants and by asserting that similar delays are true for many other members. *See* Pet. App. 47 (declarant Bobby O'Daniel alleges ongoing delay of 14 months at the time of declaration); Pet. App. 49 (declarant Keith King alleges ongoing delay of 14

months at the time of declaration); Pet. App. 53 (declarant Donald Overton alleges ongoing delays of more than five years); Pet. App. 59 (declarant Richard Weidman alleges ongoing delays of more than ten years). Petitioners also prayed for injunctive relief that would redress each individual member's injury.

While it is true that Petitioners did not request relief that would mandate a particular decision or outcome in any individual's case, they most assuredly did request relief that would benefit each individual member suffering unconstitutional delay: an order requiring that the VA reach *some* decision in each individual's case within a reasonable amount of time, so that those individuals can then either begin receiving help or at least be entitled to an appeal. The Court of Appeals and the VA ignored the individual nature of the relief sought, and thus failed to follow the standing analysis for an association mandated by *Hunt*, 432 U.S. at 342-43.

By requesting relief benefiting each of their members who suffer delays past certain maximum thresholds (whether it be 90 days after an initial application and 180 days for appeal, as sought in the Complaint, or some other maximums set by the District Court after further proceedings), Petitioners carefully followed the principles established by this Court that associations not assert claims that require the individual *participation* of each injured party. *Hunt*, 432 U.S. at 343. But Petitioners indisputably request relief that will *benefit* each individual. Petitioners' reference to average delays merely demonstrates the extent of the constitutional violations rampant throughout the VA's system; it

does not, as the VA would have it, suggest the absence of individual harm.

As even the VA acknowledges, Br. in Opp. at 8, Petitioners included the declarations of individuals who averred *specific* delays suffered by Petitioners' members. Those members will individually benefit from the relief sought for them. For example, the requested relief would provide immediate and individual relief – a decision on his claim – for Keith King, who averred that his benefits claim has been pending without a decision for 14 months. Pet. App. 49. Petitioners' requested injunction likewise would provide immediate and individual relief to each of those members of Veterans of Modern Warfare referenced in Donald Overton's declaration, Pet. App. 53-54, who have been forced to endure delays in excess of 180 days in the resolution of their appeals. The same is true with respect to those veterans cited in Richard Weidman's declaration, Pet. App. 59, who have been waiting for decision on their appeals for *more than ten years*.

The VA concedes that an association has standing under *Hunt*, 432 U.S. at 342-343 when "at least one member would have standing to sue in his own right," and that a member has standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), when the member has suffered a "concrete and particularized" injury that would be "redressed by a favorable decision." Br. in Opp. at 6. This is a relatively uncomplicated inquiry, particularly at the motion to dismiss stage. *Lujan*, 504 U.S. at 561; *see Veterans for Common Sense v. Nicholson*, 2008 WL 114919, at *2-*3 (N.D. Cal. Jan. 10, 2009) (denying VA's motion to dismiss for lack of standing based on

plaintiff's general allegations "that their organizations are comprised of veterans, including many who have claims pending before the VA or the BVA . . . ."), *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1077 (N.D. Cal. 2008) *("Peake")* (after a trial on the merits, holding that plaintiffs' members had faced significant delays with "dire consequences," caused by the VA's conduct, which would be redressed by ordering the VA to issue benefits decisions within a reasonable time). Tellingly, on appeal to the Ninth Circuit, the VA did not challenge the district court's holding regarding standing, either in its brief or at oral argument. Brief for the Appellees, *Veterans for Common Sense v. Peake*, 08 16728 (9th Cir. filed April 11, 2008); Transcript of Oral Argument, *Veterans for Common Sense v. Peake*, 08 16728 (9th Cir. argued Aug. 12, 2009), *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000003827.

Petitioners here alleged in detail the injuries suffered by individual members as a result of the VA's failure to render a decision in a reasonable amount of time and proposed a meaningful way of redressing that injury through the injunctive relief requested. Under this Court's precedent in both *Hunt* and *Lujan*, Petitioners have demonstrated associational standing in this case. *See also Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 185-86 (2000) (where "a plaintiff . . . is injured . . . due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form

of redress" that is sufficient for associational standing).

The lower courts' failure to recognize that Petitioners have standing, in conflict with the decisions of this Court, is of course crucially important to the ability of Petitioners to obtain relief on their claims, and should be reviewed in full by this Court if it is not summarily reversed.

B. The Decisions Below Conflict with this Court's Precedent in *Johnson v. Robison* and Its Progeny

Nowhere in its response does the VA reference this Court's precedent in *Johnson v. Robison*. Instead, the VA asserts that Congress intended to restrict a veteran's ability to seek relief from constitutional violations to an extraordinary appellate writ request to the CAVC, and thus intended to deny Petitioners *any* access to the federal district courts, even in those instances where the Secretary has completely failed to act (as opposed to when a veteran disagrees with the substance of the action taken). The VA's position, like that of the Court of Appeals, cannot be reconciled with the explicit holding of this Court in *Johnson v. Robison*, 415 U.S. 361 (1974), or the cases that have followed it.

As a threshold matter, the District Court and the Court of Appeals ostensibly avoid facial conflict with this Court's holding in *Johnson v. Robison* by conflating the concept of the standing of an individual member of an association with the concept of jurisdiction to adjudicate that individual member's claim. This conflation masks the

important statutory and constitutional issues at the heart of this case: the scope of 38 U.S.C. § 511 and its constitutional limitations.

The VA contends that 38 U.S.C. § 511 precludes any individual veteran from seeking relief in an Article III court to address the violation of that veteran's constitutional due process rights caused by the VA's delays. But that argument presents the question of whether Congress, in enacting Section 511, intended to foreclose access to the federal district courts for all constitutional challenges.

Several courts have answered this question with a resounding "no." In *Robison*, this Court rejected the argument that Congress had stripped the federal district courts of the power to hear constitutional challenges involving the VA's benefits programs, holding that constitutional challenges implicate the most fundamental right to judicial review and that such review must be permissible in an Article III court. *Robison*, 415 U.S. at 368-69, 373. The D.C. Circuit properly applied and followed *Robison* in reaching the conclusion that Article III courts remain open to veterans raising constitutional challenges, especially in cases where the Secretary has failed to take any action. *Broudy v. Mather*, 460 F.3d 106, 112 (D.C. Cir. 2006) (holding that Article III courts "have jurisdiction to consider questions arising under laws that affect the provision of benefits as long as the Secretary has not actually decided them in the course of a benefits proceeding"). Decisions of the Federal Circuit are similar. *See Hanlin v. United States*, 214 F.3d 1319, 1321 (Fed. Cir. 2000) (Section 511(a)'s jurisdictional bar applies

only where there has been a "decision by the Secretary" involving "questions of law and fact necessary" to a formal decision regarding an individual veteran's benefits); *Bates v. Nicholson*, 398 F.3d 1355, 1365 (Fed. Cir. 2005) ("Section 511(a) does not apply to every challenge to an action by the VA. As we have held, it only applies where there has been a 'decision by the Secretary.'"). The Sixth Circuit, however, has held that Section 511(a) precludes federal district courts from exercising jurisdiction over a claim to compel VA action unreasonably and unconstitutionally delayed. *Beamon v. Brown*, 125 F.3d 965, 971 (6th Cir. 1997). The Sixth Circuit's decision in *Beamon* cannot be reconciled with *Broudy*, *Bates*, and *Hanlin*. That conflict, along with the conflict of the Court of Appeals' decision with this Court's holding in *Robison*, calls for this Court's intervention.

C. The CAVC is Not an Adequate Alternate Forum Capable of Addressing Veterans' Constitutional Challenges

The VA's argument is also flawed as a practical matter. Opinion after opinion issued by the CAVC in mandamus cases demonstrates that the premise underlying the VA's argument is simply not true. The CAVC has proven utterly incapable of protecting veterans from the constitutional violations that infect the VA's disability benefits process, especially at the initial determination stage conducted in the Regional Offices.

For example, in *Pitts v. Shinseki*, David Pitts filed a petition for a writ of mandamus requesting the CAVC to order the VA simply to issue a decision

on his *initial* claim for benefits. 2009 WL 2031896, at *1 (Ct. Vet. App. July 15, 2009). Mr. Pitts sought benefits for a back injury he received in Vietnam, but his claim had languished due to a perceived lack of evidence that his injury was service connected. *Id.* The CAVC discussed the three conditions that must be met before the court would issue the writ. "(1) The petitioner must lack adequate alternative means to attain the desired relief, *thus ensuring that the writ is not used as a substitute for the appeals process*; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that the issuance of the writ is warranted." *Id.* at *2 (citing *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004) (emphasis added).

The CAVC then denied Mr. Pitts' petition for mandamus relief because "the petitioner can appeal any adverse determination as to his Vietnam status *should one be made*." *Id.* (emphasis added). The CAVC went on to make clear it will refuse to address any argument regarding delays in the Regional Offices: "[n]o decision concerning petitioner's entitlement to DMH compensation has been made. *Any delay* in the adjudication of the petitioner's claim is not extraordinary and does not rise to the equivalent of an arbitrary refusal to act." *Id.* (emphasis added).

The CAVC thus acknowledged in *Pitts* the Catch-22 facing our Nation's disabled veterans: a veteran who alleges that the Regional Office has failed to act *must wait for the Regional Office to act* before seeking relief, and no writ of mandamus will issue

before then because "any delay . . . is not extraordinary." *Id.*

The futility of bringing a petition for a writ of mandamus for unreasonable delay before the CAVC is further illustrated by the hundreds of cases in which such mandamus relief was requested and denied. *See, e.g.*, *Hawkins v. Principi*, 18 Vet. App. 12 (2001) (denying mandamus relief where veteran had waited 18 years for a final decision); *Pehrson v. Nicholson*, 2007 WL 2301807 (Ct. Vet. App. July 31, 2007) (denying mandamus petition after two-year delay caused by the VA's failure simply *to transmit* the veteran's claims file to the appropriate Regional Office; "trust[ing] that the Secretary will continue to develop, and ultimately, adjudicate the petitioner's claims in an expeditious manner"); *Pehrson v. Mansfield*, 2007 WL 4105282 (Ct. Vet. App. Nov. 14, 2007) (admonishing counsel and threatening sanctions for bringing a second mandamus petition in the same case despite the fact that the Secretary had failed to provide a required medical examination). After a diligent and thorough review of hundreds of CAVC cases requesting relief from the VA's unreasonable delays, Petitioners have failed to find a *single instance* of the CAVC actually granting relief. Nor does the VA's brief to this Court cite such a case.

Indeed, despite the VA's assertions, the CAVC itself has said it does not have the authority to issue a writ of mandamus to a Regional Office if an initial determination has never been made by the VA. *Dacoron v. Brown*, 4 Vet. App. 115, 119 (1993).

Moreover, even if the CAVC were to spontaneously reverse course and begin to exercise

supervisory authority over Regional Offices on a case-by-case basis to force the VA to address the delays, the notion that this piecemeal approach would provide meaningful relief to Petitioners and their members is plainly illusory. The problem of delays in the VA's disability benefits system can only be solved on a more comprehensive basis, and this Court has recognized the unique and indispensable benefits of allowing an association, in a single case, to vindicate the interests of all. *Joint Anti Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187 (1951). Critically, however, Petitioners, as veterans service organizations, are jurisdictionally barred from bringing any proceedings before the CAVC. *Peake*, 563 F. Supp. 2d at 1079. Forcing Petitioners' members to bring individual petitions for mandamus relief in the CAVC is not only futile, but also deprives Petitioners of the well-recognized benefits of associational standing.

Finally, it is equally illusory to suggest that the Court of Appeals for the Federal Circuit would ever be in a position to provide meaningful relief. As the CAVC expressed in *Dacoran*, the CAVC is an appellate court, and it disclaims original jurisdiction to hear constitutional challenges. *Dacoron*, 4 Vet. App. at 119. Under the VA's theory, no appellate court – whether it be an Article I or Article III court – would have original jurisdiction to hear a constitutional challenge concerning delays, especially at the Regional Office level. The theoretical opportunity to seek appellate review at the Federal Circuit provides no solace when, in the

first instance, no court below can even entertain a constitutional challenge.[1]

CONCLUSION

The practical result of the argument advanced by the VA in its brief in opposition is precisely what *Robison* and its progeny prohibit: the complete denial of an adequate forum for Petitioners' constitutional claims. This Court should grant review of that extraordinarily important – and constitutionally incorrect – assertion.

The petition for a writ of certiorari should be granted.

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[1] *See also Webster v. Doe*, 486 U.S. 592, 603-04 (1988); *Czerkies v. U.S. Dept. of Labor*, 73 F.3d 1435, 1441 (7th Cir. 1996) (discussing *Morozsan v. U.S.*, 852 F.2d 1469, 1474 (7th Cir. 1988)).

Respectfully submitted,

Robert E. Cattanach
Counsel of Record
Theresa Bevilacqua
Pamela Marentette
Dorsey & Whitney LLP
50 S. Sixth St., Suite 1500
Minneapolis, MN 55402
(612) 340-2600

Creighton R. Magid
Dorsey & Whitney LLP
1801 K Street, N.W., Suite 750
Washington, D.C. 20006

Counsel for Petitioner

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